164-705

TRANSCRIPT OF RECORD.

164-705

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No 284.

CHARLES W. NORDSTROM, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED MAY 31, 1895.

(15924.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 284.

CHARLES W. NORDSTROM, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

	Original.	Print.
Stipulation as to record	1	1
Transcript from superior court	2	1
Information	2	1
Motion to quash information	4	2
Demurrer to information	5	3
Transcript from justice's court	6	3
Complaint	6	3
Warrant of arrest	7	4
Sheriff's return	7	4
Judgment, etc	8	5
Bill of costs	9	5
Justice's certificate	9	5
Amendment to docket entry	10	6
Justice's certificate	10	6
Affidavit of N. Soderberg for continuance	11	7
Affidavit of N. Soderberg	13	8
Affidavit of Charles W. Nordstrom	16	9
Affidavit of Charles W. Nordstrom	20	11
Affidavit of Charles W. Nordstrom	23	13
Affidavit of Charles W. Nordstrom	24	14
Affidavit of A. G. McBride	26	15
Affidavit of A. G. McBride	28	16
Judgment and sentence	30	17
Opinion	32	17
Concurring opinion	40	22
Judgment	41	22

	Original.	Print.
Notice of appeal	42	22
Petition for allowance of appeal	45	24
Order allowing appeal and stay of execution	54	28
Assignment of errors	55	29
Affidavit of J. Henry Denning	59	31
Citation	61	31
Writ of error	64	32
Petition for rehearing	67	33
Clerk's certificate	81	39

1 In the supreme court of the State of Washington.

Stipulation.

CHARLES W. NORDSTROM, APPELLANT,
vs.
THE STATE OF WASHINGTON, RESPONDENT.

It is hereby stipulated and agreed by and between counsel for appellant and respondent that the clerk of the supreme court of the State of Washington may certify to the Supreme Court of the United States from the record in his office in the cause of the State of Washington vs. Nordstrom, the information in the cause, the demurrer to the same, and all of the record of the preliminary examination of said defendant Nordstrom before Von Tobel, justice of the peace, and also the affidavits of N. Soderberg, C. W. Nordstrom, A. G. McBride, and Von Tobel relating thereto; also the judgment and sentence, the judgment and opinion of the supreme court of the State of Washington, the notice and petition for appeal to the Supreme Court of the United States, and order of supersedeas allowing the appeal, the motion to set aside and quash the information, together with one copy of each of the briefs of the appellant and respondent; and it is further stipulated and agreed that the foregoing record, duly certified by the clerk of the supreme court, shall constitute the record in the above cause in the Supreme Court of the United States, and it is further stipulated and agreed that the respondent hereby waives no right or ground for dismissing said appeal.

JAS. HAMILTON LEWIS,
Attorney for Appellant.
JAMES A. HAIGHT,
Attorney for Respondent.

(Indorsed:) Filed Nov. 26, 1894. C. S. Reinhart, clerk.

2 *Information.*

In the superior court of the State of Washington, for King County.

THE STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } No. 472.

I, John F. Miller, prosecuting attorney for King County, State of Washington, come now here and give the court to understand and be informed and on oath do accuse Charles W. Nordstrom by this information of the crime of murder in the first degree, as follows:

He, the said Charles W. Nordstrom, in said county of King, State of Washington, on the 27th day of November, 1891, purposely, and of his deliberate and premeditated malice, killed William Mason, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Mason, with a gun which he, the said Charles W. Nordstrom, then and there held in his hands.

Dated at Seattle, in said county of King aforesaid, the 8th day of December, 1891.

JOHN F. MILLER,
Prosecuting Attorney.

3 STATE OF WASHINGTON,
County of King, ss:

John F. Miller, being first duly sworn, deposes and states that he is prosecuting attorney of King County, State of Washington, that he has read the foregoing information, and that the allegations and statements made therein are true as alleged.

JOHN F. MILLER,

Subscribed and sworn to before me this 8th day of December, 1891.

[SEAL.] W. B. SPENCER,
Clerk of Superior Court, King County, Washington,
By W. P. MCBRIDE, *Deputy Clerk.*

Witnesses for State: Dr. George M. Horton, J. F. McDonald, James H. Woolery, John Rechtenwald, Thomas Lindsay, Charles Gallager, J. P. Boylan, Thomas Mason, Edward Johnson, Chris Iverson, Mary Recktenwald, John Recktenwald, Robert Eckman, T. Crossley, John Lindsay, Ben Stretch, Mary Lindsay, James McDonald, Thomas Hoskins, Charles Hanley, William Mayfield, John Mason, James Sprague, Alexander Lindsay, Mrs. Mary Lindsay, James Ismy, O. P. Dahlquist.

(Indorsed:) Filed December 8, 1891. W. B. Spencer, clerk, by H. H. Smith, Deputy Clerk.

4 In the superior court of King County, State of Washington.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT.

Now comes the defendant herein, by N. Soderberg, his attorney, and moves the court, upon the affidavit of the defendant filed and served herewith, and upon the transcript, processes, and papers transmitted by Justice of the Peace Edward Von Tobel in said cause to the superior court and filed in said cause, and upon the information filed herein, to quash, vacate, and set aside the information of said defendant filed by John F. Miller, county attorney, in said cause, on the 8th day of December, 1891, upon the ground that said information was filed prematurely, and was and is illegal, null, and void.

N. SODERBERG,
Attorney for Defendant.

Received copy of foregoing motion this 12th day of December, 1891.

JOHN F. MILLER,
Atty. for Plaintiff.

(Indorsed:) Filed December 12, 1891. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

5 In the superior court of King County, State of Washington.

Demurrer to information.

STATE OF WASHINGTON, PLAINTIFF, }
vs. } No. .
CHARLES W. NORDSTROM, DEFENDANT. }

And now comes the defendant by his attorneys and demurs to the information filed herein, on the following grounds, to wit:

I.

That said information does not state facts sufficient to give the court jurisdiction of said defendant of said cause.

II.

The said information does not state facts sufficient to constitute an offense against the laws of the State of Washington.

III.

That it does not appear from said information when or where, if at all, William Mason died.

IV.

That it does not appear from said information whether the gun mentioned therein was loaded, and if loaded how or with what it was loaded.

V.

That it does not appear from said information what character or kind of gun is referred to in said information or that the said gun was a deadly weapon.

N. SODERBERG AND E. B. PALMER,
Attorneys for the Defendant.

(Indorsed:) Filed January 7, 1892. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

6 *Complaint.*

In justice's court, before Edward Von Tobel, justice of the peace, Seattle precinct.

STATE OF WASHINGTON,
County of King, ss:

J. H. Woolery, being first duly sworn, on oath says that at , in said King County, State of Washington, on the 27th day of Nov., A. D. 1891, Charles W. Nordstrom did commit the crime of murder in the first degree, as follows:

By then and there being the said Charles W. Nordstrom in King County, State of Washington, on Nov. 27, 1891, purposely and of his

deliberate and premeditated malice killed William Mason, by then & there purposely and of his deliberate and premeditated malice shooting and mortally wounding the said William Mason, which he, the said Charles W. Nordstrom, then and there held in his hands the said gun, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Washington.

J. H. WOOLERY.

Subscribed and sworn to before me this 4th day of Dec., A. D. 1891.

EDWARD VON TOBEL,
Justice of the Peace, Seattle Precinct, King County, Washington.

7 STATE OF WASHINGTON,
County of King, ss:

In justice court, before Edward Von Tobel, justice of the peace in and for Seattle precinct, King County.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT.

To the sheriff or any constable of said county:

Whereas J. H. Woolery has this day complained in writing, under oath, to the undersigned, one of the justices of the peace in and for said county, that on the 27th day of Nov., 1891, at ———, in said county, one Charles W. Nordstrom did commit the crime of murder in the first degree by purposely and of his deliberate and premeditated malice killing one Wm. Mason.

Therefore, in the name of the State of Washington, you are commanded forthwith to apprehend the said Charles W. Nordstrom and bring him before me to be dealt with according to law.

Given under my hand this 4th day of Dec., 1891.

EDWARD VON TOBEL,
Justice of the Peace in and for Seattle Precinct,
King County, Washington.

STATE OF WASHINGTON,
County of King, ss:

I hereby certify that by virtue of the within warrant I arrested the within-named defendant, Charles W. Nordstrom, and have him now in court.

Dated this 4th day of December, 1891.

J. H. WOOLERY,
Sheriff, King County, Wash.

Fees:

Service	$1.00
Custody	1.00
Mileage	20.00
	$22.00

8 4225.

STATE OF WASHINGTON,
County of King, ss:

In justice's court, before Edward Von Tobel, justice of the peace, Dec. 4th, 1891.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } Murder in the 1st degree.

Before me this day comes one J. H. Woolery, who, being first duly sworn on oath, says that in said King County, State of Washington, on the 27th day of Nov., A. D. 1891, Charles W. Nordstrom did commit the crime of murder in the 1st degree, as follows: By then and there being the said Chas. W. Nordstrom, then and there of his deliberate and premeditated malice, shooting and fatally wounding the said William Mason.

Complaint reduced to writing and filed. Warrant issued and served by J. H. Woolery, sheriff, Dec. 4th, 1891, and defendant brought into court. Examination proceeded with. G. M. Horton, J. F. McDonald, J. H. Woolery, John Rechtenwald, Robert Eckman, Thomas Lindsley, Alex Lindsley, Chas. Galligher, Jas. McDonald, and J. P. Boylan sworn and examined on behalf of the State. Defendant offers no testimony.

Whereupon it is ordered and adjudged by the court that there is probable cause to charge defendant, Chas. W. Nordstrom, with the crime of murder in the 1st degree, and that he be committed to the county jail without bond, there to await the action of the superior court of King County or until discharged by due process of law.

Seattle, Washington, Dec. 4th, 1891.

EDWARD VON TOBEL, *Justice of the Peace.*

9 No. of case, 4225. Date, Dec. 4th, 1891.

STATE OF WASHINGTON
vs.
CHARLES W. NORDSTROM.

Crime, murder in the first degree.
Disposition: Held to the superior court without bond.

Affidavit, 25; warrant, 1.00; filing, 30	1.55
Docketing, 25; oaths (10), 1.50; judgment, 50	2.25
Subpœnas, continuance, commitment, 50	.50
Taxing costs, 50; transcript, 1.00; cert., 50	2.00
	6.30
J. H. Woolery, sheriff:	
Service, 1.00; custody, 1.00; mileage, 20.00	22.00

John Rechtenwald,	witness,	2.00;	mileage,	4.00.....	6.00
Robt. Eckerman,	"	2.00;	"	4.60.....	6.60
Thos. Lindsley,	"	2.00;	"	8.40.....	10.40
Alex Lindsley,	"	2.00;	"	8.40.....	10.40
Chas. Galligher,	"	2.00;	"	4.60.....	6.60
Jas. McDonald,	"	2.00;	"	4.60.....	6.60
J. P. Boylan,	"	2.00;	"	4.00.....	6.00
John Hushey,	"	2.00;	"	4.60.....	6.60

Total amount of all fees, .

STATE OF WASHINGTON, *County of King, ss:*

I, Edward Von Tobel, a justice of the peace in and for Seattle precinct, King County, Washington, do hereby certify that the foregoing and annexed transcript contains, and is a true and correct transcript of, all the entries made in my docket relating to the said case of State of Washington, plaintiff, vs. Charles W. Nordstrom, defendant, and that the annexed and attached papers are all the process and other papers relating to the action and filed with me, and all of which are correct.

Dated at Seattle, Washington, 4th day of Dec., 1891.

EDWARD VON TOBEL,
Justice of the Peace in and for Seattle Precinct, King Co., Wash.

(Indorsed:) Filed Dec. 8, 1891. W. B. Spencer, clerk, by W. P. McBride, deputy clerk.

10 No. 4225.

STATE OF WASHINGTON,
County of King, ss:

In justice's court, before Edward Von Tobel, justice of the peace, Dec. 4th, 1891.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT.

The original docket entry in the above-entitled cause is amended as follows:

By inserting after the clause "and defendant brought into court." Defendant, by his attorney, W. B. Tyler, moves to continue the hearing of this cause. Motion denied.

EDWARD VON TOBEL,
Justice of the Peace.

(Indorsed:) Filed Jan. 2, 1892. W. B. Spencer, clerk, by W. P. McBride, deputy clerk.

STATE OF WASHINGTON,
County of King, ss:

I, Edward Von Tobel, a justice of the peace in and for Seattle precinct, King County, Washington, do hereby certify that the foregoing and annexed transcript contains, and is a true and correct transcript of, the amendment made in my docket relating to the said case of State of Washington, plaintiff, vs. Charles W. Nordstrom, defendant, inadvertently omitted from original docket entry by error of clerk.

Dated at Seattle, Washington, 31st day of Dec., 1891.

EDWARD VON TOBEL,
Justice of the Peace in and for Seattle Precinct, King Co., Wash.

11 In the superior court of King County, State of Washington.

Affidavit for continuance.

STATE OF WASHINGTON, PLAINTIFF,)
vs.) No.
CHAS. W. NORDSTROM, DEFENDANT.)

STATE OF WASHINGTON,
County of King, ss:

N. Soderberg, being duly sworn, on his oath says: I am the attorney of defendant, having been appointed by the court on the day of December, 1891. I can not safely go to trial in said cause on the 21st day of December, 1891, for the reason that I have not had sufficient time to prepare for the defense since my said appointment. On the 17th day of December, 1891, which was the first time I could spare from other professional engagements, I went (*went*) to Gilman, Wash., to investigate the facts connected with the said defendant's arrest, and I there learned of facts which I consider important and material to establish the defendant's innocence, and ascertained that it would be necessary for me to go to Cedar Mountain in order to follow out the clues which I obtained, and in order to learn additional facts concerning the homicide charged against the defendant herein. Owing to other important professional engagements I can not visit Cedar Mountain before the 21st of December, 1891, and until I have been to said place I am unable to determine what witnesses, if any, to subpœna for the defendant. I am informed and believe that all of the prosecution's testimony is circumstantial, and for that reason much care is needed in the preparation of said defense, and as said defendant is wholly impecunious, the
12 said work of preparation is one of difficulty.

And further affiant says not, except to ask that said cause be continued for at least a few days after December 21st, 1891.

N. SODERBERG,
Attorney for Defendant.

(Indorsed:) Filed December 18, 1891. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

13 In the superior court of King County, State of Washington.

Affidavit of N. Soderberg.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } No. 472.

STATE OF WASHINGTON,
County of King, ss:

N. Soderberg, being first duly sworn, on his oath deposes and says: I am one of the attorneys for the defendant in the above-entitled cause. After the close of the testimony given upon the trial of said action, A. G. McBride, esq., deputy prosecuting attorney made the opening argument for the prosecution which occupied over two hours in its delivery in the presence of a large audience. In said argument the said McBride incorrectly stated to the jury, as having been shown by the testimony, several matters which were material and prejudicial to the defendant of which there was no evidence, direct or circumstantial; that affiant interrupted said counsel from time to time by addressing the court and requesting the court to call the attention of said counsel and jury to the fact that said statements of counsel were erroneous and requesting the court to caution said counsel against making such statements; that in reply to each of said protests of affiant the court in substance stated that the jury were the sole judges of the facts in the case, and that counsel for the State had the right to state to the jury what he considered the testimony fairly proved or tended to prove in the case. That it was for the jury to say what had been proved or what had not been proved.

That said court failed and refused to rebuke said counsel for the pros-
14 ecution for making such remarks, and said counsel failed to withdraw said remarks from the jury, or in any wise to qualify them. That among said misstatements the said McBride stated in his said address to the jury "that from the time the defendant went to Seattle until he got to Mason's ranch he poured whisky into him." Said counsel further stated during said address, holding in his hands defendant's leather boots, with their soles turned towards the jury, substantially as follows: "We have traced this man (meaning the defendant) through these boots from Mason's house." That affiant protested against each of said statements immediately after they were made and excepted to the ruling of the court in refusing to take action upon affiant's said protest, except as above stated. That affiant interposed more than six objections during said argument to similar incorrect statements of counsel with the same result. That in response to the last or one of the last of said objections said McBride sarcastically replied "whenever you punch a calf he bellows," or words to that effect, causing the audience to laugh. That thereupon affiant concluded that further remonstrance by the defense against incorrect statements by counsel for the prosecution would be worse than futile. That afterwards John F. Miller, esq., prosecuting attorney, made the closing argument for the prosecution, during which he repeatedly pointed to the defendant, using such expressions concerning him

as these: "There sits the man that committed the murder;" "Nordstrom is the murderer of Willie Mason." That said court failed to restrain said counsel from making said or similar remarks, or to rebuke him after they were made. That affiant failed to interrupt said John F. Miller or except to said remarks of said Miller because affiant believed that objecting unsuccessfully would prejudice defendant's cause in
15 the eyes of a jury. Affiant further says that in his opinion said remarks of said McBride and Miller were very hurtful and prejudicial to the defendant in said cause.

And further affiant saith not.

N. SODERBERG.

Subscribed and sworn to before me this 4th day of March, A. D. 1892.

DAVID W. PHIPPS,
Notary Public in and for the State of Washington,
residing at Seattle, Washington.

Received a copy of the foregoing affidavit this 4th day of March, 1892.

JOHN F. MILLER,
Attorney for the Prosecution,
By WM. CALDWELL,
Deputy Prosecuting Atty.

(Indorsed:) Filed March 5th, 1892. W. B. Spencer, clerk, by D. W. Bowen, deputy clerk.

16 In the superior court of King County, State of Washington.

Affidavit.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT.

STATE OF WASHINGTON,
County of King, ss:

Charles W. Nordstrom, being first duly sworn, on his oath deposes and says: That he is the defendant in the above-entitled cause; that he is over the age of twenty-one and competent to be a witness herein; that on the 2nd day of December, 1891, a complaint in writing, verified by James H. Woolery, was duly filed in the justice's court before Hancock Neagle, justice of the peace in and for Seattle precinct, King County, State of Washington, and in the words and figures following, to wit:

In justice's court, before Hancock Neagle, justice of the peace, Seattle precinct.

STATE OF WASHINGTON,
County of King, ss:

Complaint.

James H. Woolery, being first duly sworn, on oath says: That at , in said King County, State of Washington, on the 27th day of

November, A. D. 1891, Charles W. Nordstrom did commit the crime of murder in the first degree, as follows:

By then and there being the said Charles W. Nordstrom, in King County, State of Washington, on the 27th day of November, 1891, pursued and of his deliberate and premeditated malice killed William Mason by then and there purposely and of his deliberate and premeditated malice shooting and mortally wounding the said William Mason with a gun, which he, the said Charles W. Nordstrom, then and there held in his hands, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Washington.

J. H. WOOLERY.

Subscribed and sworn to before me this second day of December, A. D. 1891.

HANCOCK NEAGLE,
Justice of the Peace, Seattle Precinct, King County, Washington.

17 That afterwards, and on said 2nd day of December, 1891, a warrant for the arrest of affiant was issued in said cause and placed in the hands of the sheriff of King County for service, and afterwards, and on said date, the said defendant was arrested under said warrant and brought before the said Hancock Neagle for preliminary examination and investigation upon said charge; that afterwards, on December 4th, 1891, came the said affiant in person and by W. B. Tyler, who was then acting as attorney for affiant, and came also the plaintiff herein, by A. G. McBride, county attorney and prosecutor, whereupon affiant, by his attorney, moved the said Hancock Neagle, sitting as committing magistrate in said cause, that the testimony of witnesses upon said preliminary examination then about to be had before said justice of the peace, and adduced in support of said complaint, be reduced to writing, which said motion, after argument by counsel for plaintiff and defendant, respectively, was granted by the court. Whereupon affiant, without his consent or that of his attorney, was taken before another justice of the peace, to wit, before Justice Edward Von Tobel, one of the justices of Seattle precinct; that affiant was not represented before said Justice Von Tobel by counsel; that testimony of several witnesses for the prosecution was heard by said Justice Von Tobel in said cause, but said testimony, nor any part thereof, was not then or at any time reduced to writing by said Justice Edward Von Tobel, or at all; that thereafter, and on the same day, affiant was by said Justice Von Tobel held to answer before the superior court of King County, Washington, upon the charge of murder in the first degree and was committed by said justice to jail without bonds; that thereafter, and on the same day, said affiant was again taken by the sheriff
18 of said King County before the said Justice Hancock Neagle, whereupon the proceeding before said Justice Neagle was dismissed upon motion of the said prosecutor, A. G. McBride.

That no other further preliminary hearing or examination has been heard upon said charge set forth in the information herein except as hereinbefore stated.

That the object and purpose of said prosecutor in taking affiant from the said court of Justice Neagle to the said court of Justice Von Tobel was for the purpose of preventing affiant from having the advantage

and benefit of the testimony against him being reduced to writing; that said Justice Neagle was at all times competent and willing to act as a committing magistrate in said cause; that said conduct and proceedings by the said prosecutor was and is injurious to affiant and violative of affiant's rights, and particularly in this, to wit: That, as affiant is informed and believes, the evidence upon which the prosecution relies for a conviction in said cause is exclusively circumstantial, and without said testimony being reduced to writing it is difficult, if not impossible, for affiant to intelligently prepare for trial in said cause.

Affiant further states that on the morning of the 9th day of December, 1891, affiant was brought before said superior court of King County and arraigned upon the information filed in said cause in said superior court; that at said time affiant was not represented by attorney; that said fact was then and there made known to the court; that the court thereupon granted affiant until 9.30 a. m. on the 11th day of December, 1891, to procure the services of counsel and to plead to said information; that at said time affiant was produced before said court, but was not represented by counsel; that thereupon affiant plead "not guilty" to said
19 information, and that affiant afterwards, and at the afternoon session of said court, on said 11th day of December, 1891, it being shown to the satisfaction of said court that affiant was unable by reason of poverty to procure the services of attorney, counsel was duly assigned by said court to affiant, whereupon leave was given to affiant's said counsel by said court to move against said information and to take such steps in said cause as he should deem advisable.

Further affiant sayeth not, except to ask that the information filed in said cause by the county attorney of King County, Washington, on the 8th day of December, 1891, be quashed and vacated and set aside.

CHARLS W. NORDSTROM.

Subscribed and sworn to before me this 12th day of December, 1891.

N. SODERBERG,
Notary Public in and for the State of Washington, residing at Seattle, Wash.

Received copy of foregoing affidavit Dec. 12, 1891.

JOHN F. MILLER,
Atty. for Plaintiff.

(Indorsed:) Filed December 12, 1891. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

20 In the superior court of King County, State of Washington.

STATE OF WASHINGTON, PLAINTIFF,)
vs.
CHARLES W. NORDSTROM, DEFENDANT.)

STATE OF WASHINGTON,
County of King, ss:

Charles W. Nordstrom, being first duly sworn, on his oath deposes and says that he is the defendant herein and competent to be a witness in said cause.

That at the time of his arraignment in said cause, and on or about the day of December, 1891, he received the following copy of the information in said cause:

Information.

In the superior court of the State of Washington for King County.

THE STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } No. 472.

I, John F. Miller, prosecuting attorney for King County, State of Washington, come now here and give the court to understand and be informed and on oath do accuse Charles W. Nordstrom, by this information, of the crime of murder in the first degree, as follows:

He, the said Charles W. Nordstrom, in said county of King, State of Washington, on the 27th day of November, 1891, purposely, and of his deliberate and premeditated malice, killed William Mason, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Mason with a gun which he, the said Charles W. Nordstrom, then and there held in his hands.

Dated at Seattle, in said county of King aforesaid, the 8th day of December, 1891.

JOHN F. MILLER,
Prosecuting Attorney.

STATE OF WASHINGTON,
County of King, ss:

John Miller, being first duly sworn, deposes and states that he is prosecuting attorney of King County, State of Washington; that he has read the foregoing information, and that the allegations and statements made therein are true as alleged.

JOHN F. MILLER.

21 Subscribed and sworn to before me this 8th day of December, 1891.

[SEAL.] W. B. SPENCER,
Clerk of Superior Court, King County, Washington,
By W. P. MCBRIDE,
Deputy Clerk.

Witnesses for State: Dr. George M. Horton, J. F. McDonald, James H. Woolery, John Rechtenwald, Thomas Lindsey, Charles Gallagar, J. P. Boylan.

In the superior court of King County, State of Washington.

STATE OF WASHINGTON,
County of King, ss:

THE STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } No. 472.

I, W. B. Spencer, county clerk of King County, and ex officio clerk of the superior court of said county, do hereby certify that I have com-

pared the foregoing copy with the original Charles W. Nordstrom in the above-entitled cause, as the same appears on file in my office, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of the said superior court at my office in Seattle this 8th day of December, 1891.

[SEAL.] W. B. SPENCER, *Clerk*,
By W. P. MCBRIDE, *Deputy Clerk*.

That no copy of said information has been delivered to or served upon affiant or his attorneys in said cause at said time of arraignment, and at the time of interposing defendant's plea of not guilty herein said defendant, without his fault, had no attorney to represent him, nor had counsel been assigned to him; that affiant is informed and believes that since the service upon him of said copy of said information, and subsequent to his said plea, a large number of witnesses have been added to and upon the original information herein without the knowledge or consent of
22 defendant or his attorney, and that said names are not found upon the said copy of said information served upon this affiant.

That affiant does not know, and has no means of knowing, and is informed and believes that his attorneys herein do not know or have the means of knowing, what said added witnesses will testify to in said cause. And further affiant saith not, except to ask that he be furnished with a copy of said information as amended as hereinbefore stated.

CHARLES W. NORDSTROM.

Subscribed and sworn to before me this 7th day of January, 1892.

N. SODERBERG,
Notary Public in and for Washington, residing at Seattle.

(Indorsed:) Filed January 7, 1892. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

23 In the superior court of King County, State of Washington.

THE STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT,

STATE OF WASHINGTON,
County of King, ss:

Charles W. Nordstrom, being first duly sworn, on his oath deposes and says that he is the defendant in the above-entitled cause and competent to be a witness therein.

That he is informed and believes that James H. Woolery, sheriff of said county, is biased and prejudiced against affiant in said cause, that he was the complaining witness in said cause both before Justices Hancock Neagle and Edward Von Tobel, and that he has been actively and zealously engaged in endeavoring to find criminating evidence against affiant herein.

And further affiant saith not except to ask that the service of the venires by said Woolery and his deputies be set aside and that an impartial person be appointed as an elisor in said cause to summons the jurors herein.

CHARLES W. NORDSTROM.

Subscribed and sworn to before me this 7th day of January, 1892.

N. SODERBERG,
Notary Public in and for Washington, residing at Seattle.

(Indorsed:) Filed Jan'y 7, 1892. W. B. Spencer, clerk, by Geo. F. Stanley, deputy.

24 In the superior court of King County, Washington.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHAS. W. NORDSTROM, DEFENDANT.

STATE OF WASHINGTON,
County of King, ss:

STATE OF WASHINGTON,
County of King, ss:

Chas. W. Nordstrom, being first duly sworn, on his oath says:

I am the defendant in the above cause. I have heard read the affidavit herein filed by Albert Waldroff in support of my motion for a new trial. The facts therein stated were unknown to me before and at the time of the trial of said cause, and were, as I verily believe, also unknown to my attorneys up to the time of filing said affidavit. I could not, nor could my attorneys, have discovered said facts and produced evidence thereof upon the trial of said cause. At the time of my arrest and up to the time of the verdict in said cause I was and now am without money, and until said verdict I had no friend to assist me in said cause except my attorney. Since that time a number of my countrymen, who believing innocence of said charge, have charitably contributed some funds towards defraying the expenses of my case, and it is only by said means that it has been possible to obtain said information. I have also heard read the affidavit of Olaus Berglin, filed in said cause this day. The facts in said affidavit stated were unknown to me and, as I verily be-
25 lieve, to my attorneys until to-day, and could not by the use of reasonable or any diligence been produced upon the trial of said cause by me or my said attorneys. And further affiant saith not.

CHARLES W. NORDSTROM.

Subscribed and sworn to before me this 19th day of March, A. D. 1892.

N. SODERBERG,
Notary Public for Washington, residing at Seattle, Washington.

Copy received and service admitted March 19, 1892.

JOHN F. MILLER, *Pros. Atty.*

(Indorsed:) Filed March 19, 1892. W. B. Spencer, clerk, by D. W. Bowen, deputy clerk.

26 In the superior court of the State of Washington for King County.

Affidavit.

STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } No. 472.

STATE OF WASHINGTON,
County of King, ss.:

A. G. McBride, being first duly sworn on his oath, deposes and says: That he is one of the deputy prosecuting attorneys in and for said county and State and represented said plaintiff at the preliminary examination in said action held before Edward Von Tobel, a justice of the peace in and for King County, State of Washington. That there was a complaint filed in said action before one Hancock Neagle, a justice of the peace for said county and State, and a warrant was duly issued for the arrest of said defendant Charles W. Nordstrom, which said warrant was placed in the hands of the sheriff of said county for service. That at the time said warrant as aforesaid was placed in the hands of the said sheriff, the sheriff of King County also had in his possession a warrant issued by the coroner of said county for the arrest of said defendant. That neither the said warrants issued by the said justice of the peace, Hancock Neagle, or the said warrant issued by the coroner of said county, was ever returned to said Hancock Neagle, justice of the peace, as aforesaid. And the said Hancock Neagle, justice of the peace, never acquired jurisdiction to hold a preliminary examination in said action by virtue of the return of any warrant or process whatever by the sheriff of said county. That the complaint was regularly filed
27 before Edward Von Tobel, justice of the peace as aforesaid, a warrant was issued and returned and a pr'liminary examination was held thereon in due and legal form as evidenced by the transcript of the proceedings of the said preliminary examination which is now on file with the other papers in the office of the clerk of this court. That the defendant, Charles W. Nordstrom, was present in person at the preliminary examination before said Edward Von Tobel, justice of the peace, and also by his attorney, W. B. Tyler, who, as attorney for said defendant, moved the examining magistrate to continue said preliminary examination; after due consideration thereof, the said motion was denied, and the said W. B. Tyler forthwith left the office of the justice of the peace and returned no more during the pendency of said examination.

A. G. McBRIDE,

Subscribed and sworn to before me this 4th day of January, 1892.

[SEAL.] JOHN F. MILLER,
Notary Public in and for the State of Washington, residing at Seattle, in said State.

(Indorsed:) Filed Jan. 5, 1892. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

28 In the superior court of the State of Washington for King County

Affidavit of A. G. McBride.

THE STATE OF WASHINGTON, PLAINTIFF,
vs.
CHARLES W. NORDSTROM, DEFENDANT. } No. 472.

STATE OF WASHINGTON,
County of King, ss:

A. G. McBride, being first duly sworn upon his oath, deposes and says: He is deputy prosecuting attorney for said county and State and assisted in the prosecution of the above-entitled cause of action; that he has read the affidavit of one N. Soderberg, counsel for defendant, and knows the contents thereof. Affiant further says that the the said N. Soderberg has not correctly stated affiant's language used in the opening argument to the jury in said case with reference to the boots claimed by the prosecution to have belonged to and worn by the defendant on the night of the alleged homicide, and the statement that affiant made was "that tracks made by the leather boot and worn by the defendant and which counsel at that time held in his hand, were followed by the sheriff of said county and his deputy a few hundred yards west of the Sprague residence to the place where the road crosses the railroad track near Gilman; and that on the following Sunday afternoon those same tracks were discovered by the cabin in which the defendant admitted that he had stayed that night."

It was not claimed in the argument of said case, or by the testimony that the defendant, Charles W. Nordstrom, had worn those boots while at the Mason residence where the homicide took place, or that those peculiar boot tracks had been discovered any nearer to Mason's
29 residence than those discovered about two hundred (200) yards west of the Sprague house. Affiant further says that during the continuance of his argument of the facts in said case he was frequently interrupted and the most frivolous objections were made as affiant verily believes for the purpose of annoying and hindering affiant in making his argument to the jury, and after from six to ten of such interruptions affiant did say "that a truthful statement of the facts seemed to hurt the feelings of the counsel for the defense—that if you struck a calf with a club it is certain to bellow."

A. G. MCBRIDE.

Subscribed and sworn to before me this the 5th day of February, A. D. 1892.

[SEAL.] JOHN F. MILLER,
Notary Public in and for the State of Washington, residing at Seattle, in said State.

Received copy this 8th day of March, 1892.

N. SODERBERG,
Atty. for Deft.

(Indorsed:) Filed Mar. 8, 1892. W. B. Spencer, clerk, by W. P. McBride, deputy clerk.

30 In the superior court of King County, State of Washington, Saturday, April 2, 1892.

Sentence.

STATE OF WASHINGTON, PLAINTIFF,
vs. } 472.
CHARLES W. NORDSTROM, DEFENDANT.

And now on this 2nd day of April, 1892, the said defendant, Charles W. Nordstrom, appeared personally in open court for sentence, and also by his counsel, N. Soderberg, and the plaintiff appeared by its attorney, John F. Miller, prosecuting attorney for said county.

Whereupon the said Charles W. Nordstrom, defendant, was directed to come forward; thereupon the court asked the said defendant if he had any legal cause to show why sentence should not be pronounced against him. Whereupon the said defendant having failed to show any sufficient reason why the judgment of the court should not be pronounced, it is

Ordered and adjudged by the court that the said Charles W. Nordstrom be taken to the jail of King County, and there kept in close confinement until such time as shall be hereafter fixed by the court, at which said time the said Charles W. Nordstrom shall be by the sheriff of King County taken from said jail to the place of execution in the said King County, State of Washington, and upon the gallows to be provided by the sheriff of King County, the said defendant, Charles W. Nordstrom, shall be then and there hanged by the neck until he is dead. The defendant thereupon forthwith in open court gave notice of appeal to the supreme court from the ruling of the court on the motions for a new trial and arrest of judgment, and the sentence.

It is here and now ordered by the court that said appeal to the
31 supreme court of said State, act, and it hereby does act as a stay of execution until said supreme court has passed upon the said appeal herein taken.

T. J. HUMES, *Judge*.

Entered: Journal 19, page 416.

32 STATE OF WASHINGTON, RESPONDENT,
v. } No. 876. Filed Dec. 30, 1893.
CHARLES W. NORDSTROM, APPELLANT.

Again the question is presented here that the appellant, under the Federal Constitution, is entitled to have the charge against him presented upon an indictment found by a grand jury. In this instance the contention is based upon the language of the enabling act, which provided that the constitution of Washington should be republican in form, and "not repugnant to the Constitution of the United States."

Much learned investigation and ingenious argument have been expended by counsel in an endeavor to impress this court with the view

that inasmuch as the Constitution of the United States, in prescribing the method of initiating prosecutions for infamous crimes against Federal laws, makes the grand jury a sine qua non, and its indictment the only lawful means of charging an offense; therefore the State constitution must conform to the same method, and any authority to prosecute by information must be repugnant to the supreme Federal law and void.

We may and do yield assent to all that is thus said, with one exception, and we should be justified in going farther than the argument made and in holding that if the provisions of the fifth amendment to the Federal Constitution apply to the matter of prosecutions for crimes against State laws, it would make no difference were there no mention of the Federal Constitution in the enabling act or the constitution of the State. The Constitution of the United States would still be the supreme law
33 of the land, and all provisions of the State constitution or laws which were actually repugnant would be utterly void. Nor could any act of Congress make any such provision one whit the less void or inoperative.

But the difficulty is that the Constitution of the United States does not assume or pretend to regulate prosecutions for offenses against State laws, and we see no reason why there should be any departure from the views on this subject expressed in Lybarger v. State, 2 Wash., 552. See Spies v. Illinois, 123 U. S., 13.

2. The information was identical with those in State v. Freidrich, 4 Wash., 204, and State v. Day, id., 104.

3. Appellant alleges error because the court below refused to quash the information, upon a showing that he had not a preliminary examination. But his real ground for the motion was that whereas a charge was made against him before Justice Neagle, that charge was not pursued, but was dismissed and a new charge made before Justice Von Tobel, before whom there was a full examination. No error.

4. The names of certain witnesses were endorsed upon the information before the trial commenced, by special order of the court, as the statute permits. (C. P., § 1230.)

5. Upon filing the information the prosecuting attorney caused a copy of it, with the names of witnesses endorsed, to be served upon appellant, and appellant complains because he was not furnished another copy when the names of new witnesses were added. The evident purpose of the statute (C. P., § 1267) is to apprise the accused, as soon after the information is filed as is reasonably possible, of the charge made against him and the names of leading witnesses. After that, notice of the
34 addition of new names of witnesses meets every reasonable requirement; and there was notice in this case.

6. The State sought to connect the appellant with the homicide by means of certain boot tracks and tracks of feet wearing only socks, impressed in soft or muddy ground near the scene of the crime; and in pursuit of its endeavor called a deputy sheriff to produce the boots and socks of appellant. These articles were taken from appellant's person upon his arrest and were retained by the sheriff to be used as evidence—the boots because it was claimed that they fitted the tracks, and the socks because they were muddy. No force whatever seems to have been used by the officers in getting possession of these things, but they were taken

from the prisoner in the course of the usual search of his person, upon his arrival at the jail. Appellant complains of the admission of the boots and socks in evidence on the ground that they were obtained by an unreasonable search of his person, and that it was a method of compelling him to give evidence against himself; but we can not sustain his position. It is generally held that an accused person can not be compelled to exhibit those portions of his body which are usually covered for the purpose of securing his identification, or in other ways affording evidence against him; though that proposition has been reduced in at least one case to prohibiting exposure only where decency would be infringed. (Ah Chuey v. State, 14 Nev., 79.)

But it has never been held that personal effects of every kind could not be taken from the person of a prisoner and used upon his trial for what they may be worth as criminating evidence. (State v. Graham, 74 North Carolina, 646.)

35 The same observations apply to the memorandum book taken from appellant's pocket and exhibited to the jury to show that a leaf found in a cabin in the woods, where it was claimed appellant had been, belonged in his book; and also to the cap which he wore when arrested, and which it was claimed had been hanging on a nail in the same cabin until the night of the homicide.

7. There was testimony tending to show that the person who fired the shot that killed William Mason had worn a certain pair of rubber boots, which it was conceded did not belong to appellant. When appellant went upon the stand he testified that he could not get these boots upon his feet, and at the request of his counsel made apparently extraordinary efforts to put them on in the presence of the jury, but without effect. In rebuttal the State called a shoemaker and had him measure the boots and appellant's feet, whereupon he testified that a foot of that size could wear those boots. Other persons were then called, and in the presence of the jury they put the boots on, after which the shoemaker measured their feet, and found them at least as large as appellant's. All this was done against objection, on the ground that the measurement of appellant's feet was compelling him to give evidence against himself. But in our judgment, after the exhibition made by appellant in his apparent efforts to get the boots on, the measurement of his feet was only a legitimate way of cross-examining him, and the subsequent testimony of the shoemaker and the other witnesses was proper rebuttal. When the shoemaker took his measurements, he had not been sworn, but he was sworn before he gave any testimony.

8. The homicide was committed on Friday evening, Nov. 27, 1891, at 6.30. Appellant, by way of accounting for himself, told of
36 his movements that afternoon and evening, and stated that at a little after eight o'clock he went into the saloon of one Cooper, at Gilman, several miles from the house where deceased was shot, and bought from Cooper a bottle of whiskey and a glass of beer, the testimony tending to show an alibi. On rebuttal, Cooper was called and testified with some positiveness that appellant was not in his saloon and did not buy anything from him on that night. On cross-examination this occurred:

"Q. Is it possible he could have come in there on Friday night and bought fifty cents' worth of liquor and you not remember the next day?

"A. Well, I do not think so; I think I should remember it.

"Q. Why do you think so? Why would you remember that particularly?"

Many other questions were asked for the purpose of getting an admission that even though the witness had seen appellant on Friday night at his saloon he might have forgotten it, and the certainty of his recollection was left somewhat shaken. But upon the redirect he was asked: "Did you know on Saturday night that this man was suspected of the murder of Willie Mason?" and he answered that he did, and that he had learned the fact about noon of that day.

"Q. Did citizens in Gilman talk anything about who they suspected of the crime?

"(Objected to as leading.)

"COURT. His question is leading.

"Q. The people living there in Gilman?

"A. Yes, sir.

"Q. Quite a number of them?

"A. Yes, sir.

"Q. You heard them talking?

"A. Yes, sir.

"Q. What did you hear them talking?

"(Objected to as hearsay, immaterial, and incompetent.)

"COURT. Objection overruled.

"A. They said a certain man had been suspected, that they suspected him.

"Q. Who was that certain man?

"A. That defendant; I forget the name."

37 The obvious purpose of this examination was to show an additional reason why the witness would not have forgotten the alleged visit of appellant to his saloon the night before, some of the reasons therefor having been challenged on the cross-examination; though the court, upon the direct question being asked whether knowledge that appellant was so suspected would have been likely to perpetuate the fact of such a visit in the witness' mind, sustained an objection to it. Counsel for appellant here urge that this redirect examination was an unfair and improper method of getting before the jury the fact that the Gilman community not only suspected him of the crime but believed him to be the guilty party; but we can not see why any such construction should be put upon the proceeding. The principal questions went unchallenged except on the ground of their leading character, and the whole attention of the court and jury must have been directed, under the circumstances, to the point whether the witness had any real recollection that appellant was not there, or a mere absence of recollection as to whether he had visited the saloon or not. Nothing was related tending to show that any person believed in appellant's guilt, but only that he was suspected, and the very first answer which was not objected to gave that information. No request was made to limit the jury's consideration of the evidence, and it was evidently thought of but minor importance, as it was not mentioned in appellant's brief in chief.

9. Attention is called to alleged improper remarks of counsel for the State to the jury and the rulings of the court thereon; but as what was

said is not preserved in the statement we can not know what the fact was. Affidavits were filed by both sides, but the court was never called upon to settle the truth of the matter.

38 10. In giving the usual cautionary charge to the jury as to the credit to be given to witnesses, the court used this language: "In the case of the defendant you have a right to consider the great interest he has in your verdict." The statement was true; a jury has a right to consider the interest of every witness (Dodd v. Moore, 91 Ind., 522), and the court does not err in so instructing. Whether in a criminal case, where the defendant testified under peculiar circumstances, he ought to be singled out as pointedly as was here done may be questionable, but no point is made on that.

11. Numerous verbal criticisms are made of various portions of the instructions, but such portions were either given at the request of the appellant or were not excepted to. Neither singly nor as a whole do they destroy the fairness or justness of the admirable charge given by the court.

12. Appellant asked the court to instruct that a failure to prove a motive for the commission of the crime would raise a strong presumption that the accused was innocent. There could be no necessity for, or propriety in, giving such an instruction. The general presumption of innocence covers it fully. The jury were told that this would be a circumstance for them to consider; to have said more would have been to trench upon the prohibition against commenting on the facts. In some cases motive may, as counsel suggests, be a very material element in determining the degree of a prisoner's guilt; but there could be no such question in this case, for the accused was either guilty of a base assassination, or he was entirely innocent, was not present and did not fire the fatal shot.

39 13. The affidavit of Waldrowf, produced on the motion for a new trial, was wholly insufficient for any purpose, relating as it did to nothing but indefinite hearsay about immaterial matters. Claus Berglin undertook to say that while it was possible appellent could have put the rubber boots on, he could not have worn them. Appellant was fully notified before the trial that one of the main points in the case would be whether he had worn those boots or not, and the first thing he did when he went upon the stand was to demonstrate that he could not possibly get them on his feet. We think it is too late now to ask that the case be opened to allow the admission of testimony which would contradict his own sworn statement.

14. The insufficiency of the evidence to justify a conviction is strongly urged. But as to this point, without extended review, we shall only say that while it was wholly circumstantial, we doubt whether any impartial reader of it would come to a conclusion different from that arrived at by the jury. Others might, perhaps, hesitate, if burdened with the responsibility of the jury, to give as conclusive effect as they have to the evidence; but all such responsibility, under the facts proven, rested with the jury alone, a' they have decided the question, after receiving the fairest possible instructions from the court.

Other points raised were either immaterial, or were not sustained by the record, and it is only left for us to direct an affirmance of the judgment,

and that the sentence imposed upon the appellant be carried into execution. So ordered.

STILES, J.

We concur.

ANDERS, J.
SCOTT, J.
HOYT, J.

40 In concurring in this opinion I wish to say that if the admission of the testimony of the witness Cooper concerning the defendant's being suspected by the people of Gilman, had been properly and duly assigned as error, I should feel bound to reverse the judgment on that ground, for I think it was most palpable prejudicial error, but as it was not assigned in appellant's first brief, I will treat it as though it were waived, and hence I concur.

DUNBAR, C. J.

41 In the supreme court of the State of Washington.

Judgment.

STATE OF WASHINGTON, RESPONDENT,
vs.
CHARLES W. NORDSTROM, APPELLANT. } No. 876.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King County and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, and having filed its opinion in writing, it is now on this 12th day of March, A. D. 1894, on motion of A. G. McBride, esquire, of counsel for respondent, considered, adjudged, and decreed that the judgment of the said superior court be, and the same is hereby, affirmed with costs, and the petition for rehearing denied, and that the said State of Washington have and recover of and from the said Charles W. Nordstrom the costs of this action taxed and allowed at sixty-nine dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

Entered: Vol. 3, Record, page 66.

42 In the supreme court of the State of Washington.

Notice.

STATE OF WASHINGTON, RESPONDENT,
vs.
CHARLES W. NORDSTROM, APPELLANT.

To the honorable supreme court of the State of Washington, to the Honorable W. C. Jones, attorney-general of the State of Washington, and his lawful deputies, to the Honorable John F. Miller, prosecuting attorney of King County, Washington, and his lawful deputies, and to the Honorable James H. Woolery, sheriff of King County, Washington, and his lawful deputies:

You and each of you will please take notice that the defendant in this case now gives notice that he does and now does appeal to the above-named cause and the whole thereof (as required by the form of writ of

error) to the Supreme Court of the United States, holding terms at Washington, in the District of Columbia, and to the next regular term thereof, beginning on the second Monday in October, 1894, and you will further take notice that this appeal has been duly forwarded to the clerk of the Supreme Court of the United States, at the city of Washington, and that the notice and the appeal in the said cause will on Monday, the 20th day of August, A. D. 1894, be duly "lodged in the office of the clerk of the Supreme Court, being the court from which judgment the defendant appeals;" and you will further take notice that this notice of appeal and appeal of the said cause has been duly filed and appeal duly taken as required by law within two years from the judgment of the supreme court of the State of
43 Washington, and being a criminal cause, known in the Revised Statutes as a felony, punishable with death or life imprisonment, the notice of appeal is now duly given within six months from the date of the judgment and order of the supreme court of the State of Washington, from which judgment it is appealed, to wit: From the 26th day of March, A. D. 1894, whereby and by reason thereof the same, without order of "the justice or one of the judges of the court from which the said judgment is appealed" acts of itself as a supersedeas of all proceedings pending the said appeal, and until the said appeal has been duly disposed of in the appellate court, to wit: the Supreme Court of the United States.

And you will further take notice that the appeal, writ of error, and transcript in this cause will be duly certified and ordered to be transferred and lodged in the office of the clerk of the Supreme Court of the United States within sixty (60) days from the date of this appeal, as required by the late act of Congress, increasing the said time for the Pacific Coast States from thirty to sixty days.

And you will further take notice that there is no judge of justice of the Supreme Court of the United States residing in the district where the defendant resides or in the district from which the defendant takes his appeal, he now elects to have and will have his citations and writs signed by either "the chief justice or one of the judges of the court from which he appeals his said cause," to wit, the supreme court of the State of Washington; and you will further take notice that this appeal is duly made and notice of the same duly tendered "within sixty days from the order of the inferior court executing the mandate of the Supreme Court" in the premises, the said order being made by the Honorable
44 Thomas J. Humes on the 23rd day of June, A. D. 1894, and this appeal being taken on the 18th day of August, A. D. 1894, whereby and by reason of which under the law the defendant also gives notice that he reserves the right to have any certain portion of the transcript of the said order of the said superior court certified to the supreme court of the State of Washington and made a part of the record of the supreme court of the State of Washington for the purposes of this appeal.

To the honorable officers herein stated, greeting:

You are here and now notified that you will please be governed by the matters in this notice and appeal accordingly.

JAS. HAMILTON LEWIS,
Attorneys for Appellant.

(Indorsed:) Filed Aug. 20, 1894. C. S. Reinhart, clerk.

45 In the supreme court of the State of Washington.

CHARLES W. NORDSTROM, APPELLANT,
vs.
STATE OF WASHINGTON, RESPONDENT.

To the honorable supreme court of the State of Washington, and to Honorable R. O. Dunbar, chief justice of said court:

Your petitioner, Charles W. Nordstrom, most respectfully represents and petitions:

I.

That he is a citizen of the United States, and was such at all the times hereinafter named, and especially on the 1st day of January, 1889, and thereafter; that on the 8th day of December, 1891, he was, by information filed by the prosecuting attorney of King County, John F. Miller, arraigned and charged with the crime of murder, was tried, convicted by a verdict of a jury, and sentence was passed by the court upon him of death on the second day of April, 1892; that he duly took an appeal to the supreme court of Washington; that among other contentions in the lower court he insisted that he was entitled to be indicted by a grand jury, within the meaning of the 5th amendment of the Constitution, as the alleged offense charged against him was infamous and capital, and not alleged to have been committed while in service in time of war; also that it was contrary to his constitutional privilege and immunity to have his account book taken from him by the jailor and put into testimony against him, and was in violation of Article 5 of said Federal

46 Constitution; also to be compelled to exhibit his person before the jury in the trial of the said cause, by withdrawing his boots and being compelled to draw on and off of his feet shoes tendered by the prosecution, in order to draw deduction of guilt by his inability or ability to conform to the measurements thereof, being in violation of Article Fifth of the Federal Constitution. He also contended that the said information in no wise charged him with offense, as it was neither precise as to the crime charged, nor certain as to the crime charged, nor the nature of the crime charged, nor stated any facts sufficient to constitute the offense of murder in the first degree, and in violation of Article VI of the Federal Constitution; also, after verdict did move in arrest of judgment upon the said ground of his objection to the said indictment, which objection was duly presented in the form of demurrer; and later, after the rendition of the verdict, upon motion in arrest of judgment, which said objections and contentions were overruled and exception duly taken thereon.

II.

That upon due appeal to this honorable court, among other assignments duly made upon the record before this hon. court:

That the lower court erred in not sustaining the demurrer to the alleged information against this petitioner, for that, as the petitioner claimed, he was entitled to be indicted by a grand jury, within the provision of Article V, section 1, of the Federal Constitution. Also and because that

under the act of Congress of February 22, 1889, he claimed a right under said act of Congress to be indicted by a grand jury within the provisions of the Federal Constitution, for that the said act of Congress, as
47 he contended, gave him a right and privilege to be indicted by a grand jury, in that, to wit, that said act of Congress was the enabling act admitting the State of Washington to the Union, and ordained that the said constitution of the State of Washington should not "be repugnant to the Constitution of the United States." Also contending and urging upon the court that under the said act of Congress admitting the State into the Union it was his right, and that under the said act of Congress he did have a right and privilege to be indicted by grand jury and to be exempt from prosecution for his life upon information presented by a prosecuting officer of the State of Washington; that he did contend that the true and proper construction of this act of Congress was that it was intended by such legislation admitting the State into the Union that the citizens then existing and thereafter should form a constitution, which should be wholly consistent and harmonious and not repugnant and inconsistent either to the provisions of the Federal Constitution guaranteeing to citizens of the United States the privilege and benefit of being indicted by a grand jury for any offense that was infamous or punishable by death.

III.

That the said record before the supreme court of the State of Washington duly presented the said questions and the said assignments of error, and this petitioner's brief duly presented the said questions, and the said supreme court of Washington did pass upon the said questions, denying to this petitioner the said right to be indicted by a grand jury, and denying to this said petitioner the right of being exempt from prosecution by information for an offense involving his life.
48 That had either of the said contentions or constructions of the act of Congress, as contended for by this petitioner, been granted and sustained, no judgment could have been rendered against this petitioner, either of death or imprisonment. That in order to pass judgment against this defendant it was necessary that the supreme court of the State of Washington duly pass upon the assigned Federal questions and assigned rights that petitioner had under the Federal law, and under that said act of Congress of 1889, contained in the Supplement to the Revised Statutes, known as the enabling act for the admission of the State of Washington, Dakota, (and Montana) into the Union of States.

IV.

That your petitioner further duly assigned that the said information, as alleged against him by the prosecuting attorney, did not contain allegations sufficient to charge the offense of murder in the first degree, or at all, and that he had a right to be indicted or informed against by an indictment or information as was understood to be such, and with all requirements and formalities as was understood and required to be a part of "indictments and informations" within the meaning of the use of the certain word in the Federal Constitution, Article V, section 1, of amendments. That the said information did not charge the alleged person

charged with being assaulted to have died or to be dead, nor that if the said person had so died that he had died as the result of any assault alleged against petitioner within a year and a day, or at all. That petitioner urged that he had a right under the Federal Constitution as a citizen of the United States, and by reason of the construction of the enabling act admitting the State of Washington into the Union, to be presented by information or indictment charging specifically
49 the nature of the offense, specific and precise, and of the elements required to constitute the offense within the meaning and construction of the said Federal Constitution, as given by the Federal courts, and as established by the common law at the time of the adoption of the word "indictment" and "information" as contained within the said Constitution and referred to in the said act of Congress aforesaid. That the supreme court of the State of Washington did duly pass upon said question and decide it adversely to the rights of petitioner, and without said adverse decision this petitioner could not have been sentenced or judgment entered against him. That it was necessary in order that judgment be entered against this petitioner that such contention be overruled, and such question of such right and privilege and immunity of this petitioner, as claimed under the Federal Constitution and under the alleged construction and claimed construction of the act of Congress, in order that the said cause of this defendant be disposed of and defendant have judgment rendered against him of death.

V.

That this defendant did duly assign as error and wrong to him the permission permitted by the lower court of one Deputy Sheriff McDonald to take the boots and socks from the feet of petitioner and take measurement of the same, and produce the same at the trial against the defendant; and also to take, against the defendant's will, the defendant's memorandum book from his pocket, and against his will to introduce in evidence against him to show what dates he was absent from his place of work, to create the presumption of his presence at the place of
50 the killing. Also that the lower court committed error and wrong in permitting the prosecuting attorney to compel the defendant's feet to be exhibited to the jury and submit to a measurement of his person, and to submit the measurement to the jury, in that it compelled the defendant to be a witness against himself, all of which course and conduct, as defendant claims, was contrary to his right within the meaning of the Federal Constitution, exempting him from being a witness against himself, and allowing him the immunity of not being compelled to testify against himself, other than he should offer or volunteer. That said Hon. supreme court duly considered the said questions, and the consideration and construction claimed by the said defendant and petitioner of his immunities and privileges under the Federal Constitution, and decided adversely to his right and adversely to his claim of immunity and privilege of exemption, and that the said decision of the supreme court of the State of Washington, denying to this defendant, the petitioner, the immunity and privilege as claimed by him under the Federal Constitution as a citizen of the United States, was a denial to him of his right

and privilege under the laws of the United States and under the Constitution of the United States, and that a decision upon the said question was necessary by the supreme court of the State of Washington in order that a judgment could be rendered or entered against the defendant by the supreme court of the State of Washington. And that but for the said judgment rendered against the right, immunity, and privilege claimed by this defendant under the Federal Constitution as a citizen of the United States, no judgment could have been rendered against him of sentence of death or other judgment.

VI.

That the petitioner did contend before the supreme court of
51 the State of Washington that that certain clause of the Constitution, being Article I, section 25, permitting the prosecution by information of offenses heretofore necessarily prosecuted by indictment, was contrary to the Constitution of the United States, and that certain legislation of the laws of 1890 and 1889 of the State of Washington, page 100, made under the said clause of the said State constitution, permitting the prosecution by information of offenses theretofore prosecuted by indictment, was invalid, and was an exercise which was contrary to the specific provision of the act of Congress admitting the State of Washington into the Union, and permitting the formation of a constitution, and that the same was repugnant to the Constitution of the United States and to the laws of the United States. That the said supreme court decided that the said provision of the constitution of the State of Washington was not invalid, and the said provision of the constitution of the State of Washington and the said law thereunder was not repugnant to the Federal Constitution, or any law of the United States under which the defendant claimed any right, privilege, or immunity.

VII.

That the decision of the supreme court of the State of Washington was made and rendered on the first day of January, 1894; that a due and proper petition for rehearing by the said defendant was duly made and filed, which was taken under advisement for the consideration of the above-named honorable court, and was passed upon and denied, and immediately ordered to be sent to the superior court of King County on the 26th day of March, A. D. 1894; and that no notice of the overruling of the petition for rehearing or the return of the remittitur to
52 the clerk of the superior court of King County was in any wise given to the defendant or his counsel; that he had no knowledge or information of the same in anywise whatsoever until the 23rd day of June, 1894, when the said defendant was called by the Hon. Thomas J. Humes for sentence in accordance with the mandate of said remittitur; and that the Hon. Thomas J. Humes, judge of the superior court, in which said court the defendant was tried, did, on the said 23 day of June, A. D. 1894, sentence this petitioner to be hanged by the neck until dead, in accordance with the mandate of the supreme court of the State of Washington, and that said hanging of this petitioner be on the

31st day of August, A. D. 1894, under the execution and orders of the sheriff of King County. That six months have not elapsed from the date of the judgment of the supreme court of the State of Washington, nor sixty days from the date of the judgment of the said supreme court and of the order from the said superior court of the county of King executing said mandate, and that there is no law nor procedure authorizing or permitting any further or other appeal to the supreme court of the State of Washington from the said order and sentence of the said Hon. Thomas J. Humes, judge of the said superior court, condemning and sentencing this petitioner to death.

Wherefore, and by reason of the premises, this petitioner, through his attorney, James Hamilton Lewis, most respectfully petitions the honorable chief justice of the supreme court of the State of Washington to allow him an order of appeal of his said cause to the Supreme Court of the United States, upon such errors as will be and are duly assigned, wherein he may manifest and present such rights, privileges, and immunities as he contends are his under the Constitution and laws of the United States, and as he contends have been denied and refused
53 him by reason of the laws of the State of Washington, which he hath pled are repugnant to and contrary to and against the laws of the United States and the Constitution of the United States, under which he claims the rights, privileges, and immunities as herein set forth.

Also that your honorable court will, in granting the appeal, duly grant to this petitioner an order superseding his execution and staying the same until the said appeal shall be duly heard by the Supreme Court of the United States. And your petitioner will ever pray.

JAS. HAMILTON LEWIS,
Attorney for Petitioner.

STATE OF WASHINGTON,
County of King, ss:

Charles W. Nordstrom, being first by me duly sworn, on oath deposes and says that he is the petitioner named in the foregoing petition, that he has heard the same read, knows the contents thereof, and believes the same to be true.

CHARLS W. NORDSTROM.

Subscribed and sworn to before me this 17th day of August, A. D. 1894.

[SEAL.] ERNEST S. LYONS,
Notary Public within and for the State of Washington, residing at Seattle, King County.

(Indorsed:) Filed Aug. 25, 1894. C. S. Reinhart, clerk.

54 In the supreme court of the State of Washington.

CHARLES W. NORDSTROM, APPELLANT,
vs.
THE STATE OF WASHINGTON, RESPONDENT.

This cause coming on upon motion and petition of the said defendant asking for the allowance of appeal of his cause to the Supreme Court of

the United States upon the grounds claimed in his complaint and petition, and also for an order of supersedeas staying execution pending his said appeal, and also for order fixing security, and being advised, I, R. O. Dunbar, chief justice of the supreme court of the State of Washington, do adjudge and order that the said appeal of the said defendant be, and the same is hereby and now, allowed, and that by reason of the premises that the said defendant is under sentence of death and not under any money judgment, that security as usually required by the rules be waived and none be ordered against the defendant, and that the sentence and order made against him sentencing him to death and commanding that he be executed on the 31st day of August, A. D. 1894, at the city of Seattle, King County, be superseded, and all proceedings upon the said judgment of this court and of the judgment and sentence of the superior court of the State of Washington for King County be here and now stayed until the further order of this court in the premises.

R. O. DUNBAR,
Chief Justice.

(Indorsed:) Filed Aug. 25, 1894. C. S. Reinhart, clerk.

55 In the Supreme Court of the United States.

Assignment of errors.

CHARLES W. NORDSTROM, APPELLANT,
vs.
STATE OF WASHINGTON, RESPONDENT.

Comes now the petitioner and defendant, by James Hamilton Lewis, his attorney, and to wit, afterwards, on the day of August, A. D. 1894, at the city of Olympia, the said petitioner says:

That in the record and proceedings in the above-entitled matter in the supreme court of the State of Washington there is manifest error in this, to wit:

I.

That there was no authority or right in the prosecuting officer, John F. Miller, in the county of King, State of Washington, to present this petitioner for the crime of murder by information; that the honorable supreme court committed error in sustaining such right in behalf of the prosecuting attorney and denying to this petitioner the right and privilege of being indicted and presented by indictment of a grand jury.

II.

That the said information, as presented, contained no matter sufficient to constitute the alleged crime of murder in the first degree, in that it was neither specific as to the matters charged nor as to the crime charged, nor in compliance with the provisions of the Federal Constitution guaranteeing the right of a specific charge, with full allegations of the nature and cause of the accusation.

56 That the honorable supreme court of the State of Washington committed error in holding the said information valid and denying to this defendant the privilege, right, and immunity of being exempt from being tried upon an information defective in form and void in substance, and contrary to the spirit of the Const'ution and to the laws of the United States thereunder, and against the rights of this petitioner under the laws of the United States as contended by the petitioner.

III.

That the honorable supreme court of the State of Washington committed error in denying to this petitioner the privilege of being exempt from having his memorandum book taken from his pocket by the officers of the law in King County, and the entries therein presented against him at the trial. That said honorable supreme court committed error in not exempting and permitting and recognizing this defendant's immunity from being compelled to have his boots and socks produced forcibly in evidence against him, after having been forcibly taken from his feet; that said honorable supreme court committed error in refusing to exempt this defendant and allow him an immunity and privilege from being compelled to submit his body, to wit, his feet, to measurement against his will, as assigned in his complaint; that said honorable court committed error in not granting to this petitioner the right of immunity and privilege from being compelled to be a witness against himself further than he volunteered, guaranteed by the provisions of the Federal Constitution and that certain act of Congress of 1889 and 1890 contained in the Supplement to the Revised Statutes; that the said honorable supreme court had no authority or jurisdiction to render the mandate to the superior court of the State of Washington, ordering a sentence to be exe-
57 cuted against the defendant, and that the said judge of the said superior court had no jurisdiction nor authority to sentence this defendant to be hanged on the 31st of August, 1894, or at all.

IV.

That the whole of the same and all of the conduct hereinbefore referred to was error in this: That denied to this petitioner his privileges and immunities under the law and under the Constitution of the United States, and under the act of Congress of 1889 and 1890 known as the enabling act, hereinbefore referred to.

Wherefore the said petitioner, Charles W. Nordstrom, prays that the Supreme Court of the United States shall order that the said judgment of the supreme court of the State of Washington and of the superior court of King County, State of Washington, respectively, made herein, ordering this defendant to be sentenced, and the sentencing of this defendant to death, or at all, be reversed and held for naught, and this defendant be discharged without day.

JAS. HAMILTON LEWIS,
Attorney for the Petitioner.

58 (Indorsed:) No. 876. In the Supreme Court of the United States. Charles W. Nordstrom, appellant, vs. The State of Washington, respondent. Assignment of errors. Filed Aug. 25, 1894. C. S. Reinhart, clerk.

59 In the Supreme Court of the United States.

Affidavit.

CHARLES W. NORDSTROM, APPELLANT,
vs.
THE STATE OF WASHINGTON, RESPONDENT.

UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

J. Henry Denning, being first duly sworn, on his oath deposes and says: That at all the times herein mentioned he was, and now is, a citizen of the United States and a resident of the State of Washington and above the age of twenty-one years.

That on the 24th day of August, A. D. 1894, he received the hereunto attached "order," "writ of error," "assignment of errors," and "petition," and that on the said 24th day of August, A. D. 1894, he duly served the same on Hon. John F. Miller, prosecuting attorney of King County, State of Washington, by leaving with the said Hon. John F. Miller a duly certified copy of each of the above-mentioned papers at his office in King County, in said State.

That on the said 24th day of August, A. D. 1894, he received the hereunto attached "order," and that on said 24th day of August, A. D. 1894, he duly served the same on Hon. James H. Woolery, sheriff of King County, State of Washington, by leaving with the said James H. Woolery a duly certified copy of said "order" at his office in King County, in said State.

J. HENRY DENNING.

Subscribed and sworn to before me this 24 day of August, A. D. 1894.

[SEAL.] WALTER A. KEENE,
Notary Public within and for the State of Washington, residing at Seattle.

60 (Indorsed:) No. 876. In the Supreme Court of the United States. Charles W. Nordstrom, appellant, vs. The State of Washington, respondent. Affidavit of service. Jas. Hamilton Lewis, atty. for plaintiff. Filed Aug. 25, 1894. C. S. Reinhart, clerk.

61 In the United States Supreme Court, holding terms at Washington, District of Columbia.

Citation.

CAHRLES W. NORDSTROM, APPELLANT,
vs.
THE STATE OF WASHINGTON, RESPONDENT.

To the State of Washington and to the Honorable John F. Miller, prosecuting attorney for King County, representing the State of Washington, greeting:

You will take notice that whereas Charles W. Nordstrom has taken appeal in that certain cause wherein he is appellant and the State of

Washington is respondent to the Supreme Court of the United States; and whereas a writ of error has been duly signed by the chief justice of the supreme court of the State of Washington, directing that the records and proceedings of the said supreme court of the State of Washington be duly transmitted to the clerk of the Supreme Court of the United States, and that the cause be duly docketed for the next regular term, to wit, November, 1894:

Therefore, you and the State of Washington are commanded to be and appear before the Supreme Court of the United States within sixty days from the date hereof, and there to make known your appearance as representing the defendant, or in behalf of the defendant, or as the defendant, to make answer or to show cause in any wise, by any appropriate proceeding that may be called for by the condition of the cause, why the relief prayed for by the appellant should not be granted in manner and form as asked.

62 And further please take notice that this citation is addressed to and intended as a notice for your appearance at the next regular term of the Supreme Court of the United States, beginning October eighth, 1894, and continuing to December, its regular adjournment; and you, the State of Washington, and the Honorable John F. Miller please be governed accordingly.

[L. S.] R. O. DUNBAR,
Chief Justice Supreme Court State of Washington.

Attest:

C. S. REINHART, *Clerk.*

63 (Indorsed:) No. 876. In the Supreme Court of the United States. Chas. W. Nordstrom, appellant, vs. The State of Washington, respondent. Copy citation. Jas. Hamilton Lewis, atty. for appellant. Original of within citation received and due service of the same acknowledged this 27th day of August, 1894. John F. Miller, prosecuting attorney for King Co., Washington. Filed Aug. 31, 1894. C. S. Reinhart, clerk.

64 In the Supreme Court of the United States.

Writ of error.

CHARLES W. NORDSTROM, APPELLANT,
vs.
THE STATE OF WASHINGTON, RESPONDENT.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme judicial court of the State of Washington, greeting:

Because in the record and proceedings as also in the rendition of the judgment against the defendant in the above-named cause in the said supreme judicial court of the State of Washington before you, being the highest court of the said State in which decision could be had in the suit between the State of Washington and the defendant, Charles W. Nordstrom, wherein was drawn in question the validity of the constitution of the State of Washington and the statutes of the State of Washington, and an authority exercised under the constitution and the statutes of the

State of Washington, and also the validity of a statute of and an authority exercised under the act of Congress of the United States and of the Constitution of the United States, and especially that act of Congress of the United States being known as the enabling act of the State of Washington and Dakota et als., and of the year 1889 and 1890, contained in the Supplement to the Revised Statutes, and wherein the validity and the construction of the same was drawn into question upon
65 an immunity, right, and privilege under the said laws of the United States and the Constitution of the United States, as claimed by the defendant, and wherein said decision of the said court was against the validity of the said claims and against the construction of the said act of Congress and the Constitution of the United States as claimed by the defendant; and the said decision of the supreme court of the State of Washington was against the right, privilege, and exemption specially set up and claimed under the clause of the Constitution and the statutes of the United States;

And whereas, by reason of the same and of the premises, a manifest error hath happened, to the great damage of the said Charles W. Nordstrom, as by his complaint appears: Therefore, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the defendant aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of November, A. D. 1894, at that certain session of the Supreme Court of the United States beginning on the second Monday of October, 1894, to be then and there held, that the records and proceedings aforesaid be inspected, and the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.]

A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.
By R. M. HOPKINS,
Deputy Clerk.

This writ is allowed.

R. O. DUNBAR, *Chief Justice.*

66 (Indorsed:) No. 876. In the Supreme Court of the United States. Charles W. Nordstrom, appellant, vs. The State of Washington, respondent. Writ of error. Copy. Filed Aug. 25, 1894. C. S. Reinhart, clerk.

67 (On cover:) In the supreme court of the State of Washington. State of Washington, respondent, vs. Charles W. Nordstrom, appellant. No. 876. Appeal from superior court, King County. Appellant's petition for rehearing. Jas. Hamilton Lewis, attorney for appellant and petitioner. Arthur E. Griffin, of counsel.

68 In the supreme court of the State of Washington.

STATE OF WASHINGTON, RESPONDENT,
vs.
CHARLES W. NORDSTROM, APPELLANT.

Petition for rehearing.

To the honorable supreme court of the State of Washington:

The petitioner most respectfully begs that the court will grant him a full consideration upon this petition for rehearing which is addressed to

ONE POINT ALONE.

In the opinion filed in this cause, paragraph No. 10, this honorable court says: "In giving the usual cautionary charge to the jury as
69 [2 to the credit to be given to witnesses, the court used this language: 'In the case of the defendant you have a right to consider the great interest he has in your verdict.' The statement was true; a jury has a right to consider the interest of every witness, and the court does not err in so instructing. Whether in a criminal case, where the defendant testifies under peculiar circumstances, he ought to be singled out as pointedly as was here done may be questionable, but no point is made on that."

That this charge, which refusing to treat the defendant as a witness and applying the doctrine of witnesses generally to him, singled him out as the defendant and as such defendant informed the jury—

1st. That the defendant had an interest.

2nd. That his interest was great.

3rd. They must consider this great interest of his.

4th. That they should receive his testimony less the credit his great interest, as the judge assumed, would take from it.

Now, that this was wrong is not only sustained by the record and the established law, but is, under circumstances indicated in the opinion, said to be questionable and impliedly said wrong, where the defendant is singled out as pointedly as was here done.

But says this honorable court, "No point is made on that," and the court thereby suggests, forsooth, no point ought to be made of that.

But I respectfully beg to call the learned court's attention that it fell unconsciously into error in this statement.

The vice of that instruction as pointed out in
70 [3 Point XX, on pages 30 and 31 of supplemental brief, and
Point VII, on page 15 of original brief,
was, that it did single out the defendant first as witness, second as defendant; that the court in so singling him,

1st. Called attention to his interest.

2nd. Decided as a fact that this was to be considered as affecting his credibility.

3rd. That it was a charge on the weight of testimony.

4th. That the court decided that the fact of interest was a thing that ought or would affect this credibility.

In original brief, filed in skeleton form, but permitted by this honorable court, through the voice of the honorable justice who wrote the opinion in this case, this point of singling out the defendant, and this reference to his interest, is italicized.

The further point that the error was heightened from the fact that defendant was his only witness.

And counsel for the defendant, in his argument to the court referring to this error, said substantially as follows:

He first read the whole instruction, then said when he reached the part referring particularly to the defendant, "Thus far, if the court please, this instruction was correct and permissible; here it applies indiscriminately and generally to all witnesses for the State, or for the defendant, the prosecution's witness as such, or the defendant as such witness;

71 [4 but when the learned court below proceeded further to discriminate and issolate the defendant and make particular application of the general rule that the defendant's interest, in the mind of the court, was so great that it would affect the credibility of the defendant as a witness, this was going too far, and if it were not for the great respect and esteem that I have for the ability and good intentions of the learned judge who tried this case I could not refrain from assaulting this singling out of the defendant as pernicious."

This is almost literally the remarks of counsel on this point, and in his argument he supports this by the observation that under the Constitution and statutes he believed the court had no authority in the abstract to make a reference to the defendant's testifying or not testifying, or his testimony when he did testify coupled to all this.

On page 31 of the supplemental brief, which was full and explanatory, the defendant further makes the point specifically for the court in the following words:

"The singling out the defendant thus was wrong. He was the only witness on the main fact for himself."

Can the point of the defendant being singled out be made stronger or clearer? Is not the very sentence used in the learned opinion of this court the sentence practically used in the defendant's objection and assignment of error? The point is therefore made in the very words following:

"The singling out of the defendant thus," etc.

72 [5 Now, I beg to call this honorable court's attention, for the purpose of justifying this exception, and sustaining this assignment of error, and authorizing the court to grant this petition.

And impelling the court to grant a new trial.

BUT ONE SINGLE DECISION.

Since filing the briefs in the case at bar and while under deliberation the Supreme Court of the United States, on December 25, 1893, handed down the decision in Hicks vs. United States (vol. 14 Sup. Ct. Rep. No. 7, page 147).

This was a case of murder. The sentence was death. It was an appeal from a Federal judge whose power to discuss the facts and give his opinion on the evidence as settled by the now celebrated decision in the 118 U. S. was practically unlimited.

Yet notwithstanding this, the instruction complained of, the giving of which caused the reversal of the judgment, was a charge given by the court on the defendant's testimony.

The defendant in this case, as in the case at bar, was his only witness to the main fact in his own defense, among other things in the form of cautionary instructions, the court trying the case said:

"You are to consider his interest in this case, you are to con-
73 [6 sider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement," etc.

Mr. Justice Gray, writing the opinion for the court, after referring to other subjects, says: "The learned judge further, in this instruction, argued to the jury that in considering the personal testimony of the accused they should consider 'HIS interest in the case.' * * * It is not easy to say what effect this instruction had upon the jury. * * * It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and perhaps a judge can not be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that many men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give a reasonable effect and force to the law."

It will be noted that the learned Supreme Court of the United States used as reasoning why the charge of the lower court was vicious
74 [7 and unjust, the exact line of reasoning which appellant was fortunate enough to use in assignment of error. (A flattering consolation to appellant.)

"That a man is testifying in his own cause is sufficient to discredit his testimony, we deny. The prisoner is to have his defense of himself discredited from the mere fact that it is himself, and that he has an interest in the saving of his own life, we dispute. It is a charge not tolerated in modern cases."

We beg that this honorable court will review this opinion and say whether that opinion, considering its source, the limit to which the lower Federal court was permitted by the Federal laws, the far less limits alone permitted the courts of our State by the constitution and say, is not this case under the circumstances involved, authority rather than simply precedent.

The court will note that in both instances the defendant was his only main witness.

In both instances the charge of the court went to the same extent. If the charge of the Federal judge was in some respects more detailed than that of the superior judge this excess of detail could not make more

erroneous the charge of the superior judge in view of the privileges permitted in this respect a Federal judge when compared to the limit on the superior judge by the constitution and statutes.

75 [8 Now, the only authority cited by the learned judge writing the opinion in this case at bar as going to sustain the instruction is the case of Moore vs. Dodd, a civil case (91 Ind. 522).

But we beg to call to the court's attention that the rule here laid down would have no place in a criminal case where the defendant was discriminated and singled out, but aside from this we beg to call to the attention of this court that the same supreme court of Indiana had distinguished and afterwards overruled this decision, as having any application to a case like the one at bar.

See especially Unruh vs. The State (105 Ind. 117–124; same cases, 4 Northeastern, 453.)

This case is full and is a wise discussion and fully discusses Dodd vs. Moore, and say that case applied generally to all witnesses, and added quoting from that case the following:

"Surely the courts can not say as a matter of law, and because a witness may have an interest in the litigation, less weight should be given to his testimony."

And the court in this case decide—

"It is error for the court to invade the province of the jury by

76 [9 instructing them as to the credibility of certain witnesses or the weight to be given their evidence."

The court adhere to the decision and the distinction drawn in Morris vs. State (101 Ind., 560).

And in a later discussion upon this same subject the same court distinguishing the rule generally applied to all witnesses generally in the case of Dodd vs. Moore.

And have further to say in Bird vs. The State (107 Ind., 154; same case in 8 Northeastern, 14) as follows, referring to the instruction given calling the jury to note the deep interest the defendant has in the result of the prosecution, etc.: "This instruction can not be sustained very clearly; it discredits the testimony of appellant. It is equivalent to telling the jury that it was their duty to keep in mind the fact that appellant was defendant, etc. * * * The statute makes the evidence of the accused competent in his own behalf; and, when he goes upon the witness stand, he has a right to put his evidence before the jury unprejudiced by any adverse criticism by the court. He has a right to

77 [10 ask that his testimony, alone and unsupported, shall be taken as of controlling weight in the case if the jury think proper, whether it is consistent or inconsistent with all the other facts and circumstances in evidence. It is true, the jury were also instructed that they were the judges of the credibility of the witnesses, including appellant; but, as to him, that must be limited by the portions of the sixth instruction above commented upon. From them the jury would understand that, while they might judge of his credibility, it was under the injunction to keep in mind that he was the defendant and 'deeply interested in the result of the prosecution,' and that his evidence could not be of controlling weight in the decision of the case, unless consistent with the facts and circumstances in evidence against him."

We appeal again to the court to observe how literal are the instructions of the court as compared to the one under consideration condemned as they are in the cases cited here again by appellant. (Buckley vs. State, 62 Miss., 705; Meuly vs. State, 19 Southwestern, 915.)

The court says:

"On a trial for murder, after testifying in his own behalf, defendant requested an instruction that the jury were the sole judges of the credibility of his testimony, and that they should judge and weigh it as they would that of other witnesses; which the court gave, adding that the jury should also consider defendant's interest. Held, that the addition
78 [11 was erroneous, as singling out and instructing upon the evidence of a particular witness, and as a charge on the weight of evidence."

In Commonwealth vs. Pease, 137 Mass., 576, the supreme court of Massachusetts says that it would not be competent for the lower court to charge the jury "that the testimony of the sheriff of the county is as a rule of law to be distrusted because he is interested in the result, nor that because a witness is interested it should be distrusted."

Particularly upon this point we again invite the court to State vs. Maynard (9 Pac., 514); Wood vs. State (7 Southern, 495); State vs. Ward (12 Southwestern, 537); 10 Criminal Law Mag., 315.

FAILURE TO EXCEPT, OR TOO GENERAL EXCEPTIONS.

If this honorable court, in the words "no point is made on that," meant in reference to this instruction of the lower court that no point was made at the time the charge was given by the counsel trying
79 [12 the case, then we beg leave to inform the court that the point is now made. The life of this defendant is now in the hands of this court, his death must be upon their judicial heads, rightfully if the evidence is true, wrongfully if the testimony is false.

Every presumption should be urged and granted in his favor that would give appellant opportunity to sift this testimony to its last sand.

And we press to the attention of the court that the absolute failure to take an exception, or the taking of too general an exception, can not in this court avoid or prevent the defendant from having the benefit of the law, whatever it is.

So said this court in the case of Freidrich vs. The State (3 Wash., 418).

So say the Supreme Court of the United States where the exact point, as suggested here, was made in Hicks vs. United States, cited above.

Again, all omissions of this nature will certainly pass unheeded by this honorable court, when it is remembered that the State appointed counsel for the defendant.

The State became, as it were, his guardian. The counsel became, as he was, the agent of the State in this capacity. Whatever failures or omissions there were, were those of the State.

Surely she will not condemn a citizen to death, where unjustly convicted, because of her own omission to secure him and grant him
80 [13 the due instruments to secure him a fair and just trial from court to court, as provided and guaranteed by the constitution of the State of Washington and the laws thereunder.

I most respectfully urge that a rehearing be granted in this case, and that, consistent with a great pressure on this honorable court, it will consider with patience this man's case, in view of its momentous gravity and the woeful consequences of an adverse decision.

With great appreciation for indulgence, I most respectfully submit this petition.

JAS. HAMILTON LEWIS,
Attorney for Appellant and Petitioner.
ARTHUR E. GRIFFIN,
Of Counsel.

81 STATE OF WASHINGTON, DEFENDANT IN ERROR, *v.* C. W. NORDSTROM, PLAINTIFF IN ERROR. } No. 876.

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of so much of the record of the above-entitled cause as I am directed by the stipulation filed herein to transmit to the Supreme Court of the United States.

And in pursuance of the writ of error filed herein I herewith transmit said record, together with the original writ of error and the original citation issued herein, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this twenty-sixth day of January, A. D. 1895.

[SEAL.] C. S. REINHART,
Clerk of the Supreme Court, State of Washington.

(Indorsement on cover:) Term No., 284. Charles W. Nordstrom, plaintiff in error, vs. The State of Washington. Case No. 15924. Washington supreme court. Supreme Court U. S. Clerk's office. Received Feb. 6, 1895. Filed May 31, 1895. Jas. Hamilton Lewis.

164-705

Office Supreme Court U. S.
FILED.
OCT 6 1896
JAMES H. McKENNEY,
CLERK.

164-705

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 284.

CHARLES W. NORDSTROM, PLAINTIFF IN ERROR,

vs.

STATE OF WASHINGTON.

MOTION.

Comes now the appellant, by James Hamilton Lewis, his attorney, and moves the Court that the appellant be exempted from the payment of the fees necessary to have the record herein printed, and that the same be printed either at the expense of the Government or the printing of the same be waived by the Court and the cause heard upon the record as submitted.

This motion is based upon the affidavit made herein of Charles W. Nordstrom, showing him to be a pauper, and the record in this cause upon appeal, special reference to the same and to each of the same being most respectfully prayed.

JAMES HAMILTON LEWIS,
Attorney for Plaintiff in Error.

[Endorsed:] Copy of within motion received and due service of the same acknowledged this — day of August, 1896. A. W. Hastie, prosecuting attorney, attorney for respondent, by W. W. Wilshire, deputy pros. att'y.

[Endorsed:] Case No. 15,924. Supreme Court U. S., October term, 1896. Term No., 284. Chas. W. Nordstrom, P. E., *vs.* State of Washington. Motion of P. E. to be exempted from fees for printing record. Filed Aug. 27, 1896.

IN THE UNITED STATES SUPREME COURT.

CHARLES W. NORDSTROM, *Appellant*,
vs.
STATE OF WASHINGTON, *Respondent*.

STATE OF WASHINGTON, *County of King*, } *ss*:

Charles W. Nordstrom, being first duly sworn, on his oath deposes and says: That he is the defendant and appellant in the above-entitled cause; that, as shown by the record in the above-named cause, he has been tried and convicted of the alleged crime of murder in the first degree, and was, as penalty for the same, sentenced to death; that said trial and sentence was imposed upon him in the county of King, the superior court of said county; that he duly appealed from said superior court and the judgment therein rendered to the supreme court of the State, whereat and wherein the said judgment was affirmed upon grounds, among others, that exceptions had not been duly taken or properly taken in order to preserve the grounds of his complained-of error; that from the said judgment of the supreme court of the State of Washington he duly appealed to the Supreme Court of the United States, upon the grounds and for the reason that he had been denied a privilege under the law as a citizen of the United States; had been denied due process of law as entitled him under the Con-

stitution; had been placed upon trial without indictment or due preliminary presentment, and was tried contrary to his rights as a United States citizen, convicted and condemned to death in violation of the laws of the United States, the Constitution of the United States, and particularly in violation of the act of Congress admitting the State of Washington into the Union and prescribing the manner of its conduct of trials; that the said appeal upon the said grounds has been duly taken to the Supreme Court of the United States and duly lodged; that the clerk of the United States Supreme Court, as it became his right and his duty, has informed appellant that the record of his appeal is to be printed, and that the costs of the same, exceeding the sum of three hundred and ninety dollars, must be paid; that appellant is of Swedish birth and educated in English customs; is a laborer by occupation, is a pauper, has no means to pay expenses nor engage counsel, nor has he had any; that the only expense that has been provided has been provided his counsel through contributions and collections of Swedish citizens and others charitably inclined; that the same and the whole of the same have wholly been exhausted, and that he has no further or other sum at all, nor has any of his friends, nor can any be raised from any source at all, nor has affiant any property or means of any nature whatsoever, or claim or demand upon any person whomsoever, nor has affiant any relations or relatives that he is aware of save his parents, who are somewhere in Sweden and of the peasantry and poor; that he is without any funds to pay for the said printing or to secure the same, or property to secure the same, or any source whatsoever to secure the same or pay the same; that he is not guilty of the crime charged against him and can so prove if he can but be accorded a fair trial; that he has used every diligence, but has been unable to raise funds or property or to secure in anywise the amount due for the printing and the further fees due the clerk of the court, and makes

this affidavit, as authorized by law, in order that the said printing of the record may be had at the expense of the United States or may be waived, as is the practice of the courts in such case made and provided, under the act of Congress in such case passed and existing; that this affiant makes this affidavit for the purpose of having such course taken as will enable him to have a hearing before the court of his cause, which is set down for October the 19th, 1896.

CHARLES W. NORDSTROM.

Subscribed and sworn to before me this 21st day of August, 1896.

[SEAL.] DUNCAN G. INVERARITY,
Notary Public in and for the State of Washington,
Residing at Seattle, in said State.

[Endorsed:] Copy of within affidavit received and due service of the same acknowledged this — day of August, 1896. A. W. Hastie, prosecuting attorney, attorney for respondent, by W. W. Wilshire, deputy pros. att'y.

[Endorsed:] Case No. 15,924. Supreme Court U. S., October term, 1896. Term No., 284. Chas. W. Nordstrom, P. E., *vs.* The State of Washington. Affidavit of P. E. of his inability to pay costs. Filed Aug. 27, '96.

164-705

164-705

Office Supreme Court U. S.
FILED.
OCT 9 1899
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

CHARLES W. NORDSTROM,
Appellant,
vs.
THE STATE OF WASHINGTON,
Appellee.

No. 284.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT ON MOTION TO DISMISS, AND ARGUMENT ON THE MERITS

JAMES HAMILTON LEWIS,
Attorney for Appellant.

J. A. STRATTON,
L. C. GILMAN, *of Counsel.*

NEWMAN & MOULTON, PRINTERS, SEATTLE

IN THE

SUPREME COURT

OF THE

UNITED STATES

CHARLES W. NORDSTROM,
Appellant,

vs.

THE STATE OF WASHINGTON,
Appellee.

No......

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT ON MOTION TO DISMISS, AND ARGUMENT ON THE MERITS

JAMES HAMILTON LEWIS,
Attorney for Appellant.

J. A. STRATTON,
L. C. GILMAN, *of Counsel.*

Appellant insists that his appeal is well taken, both in point of jurisdiction and on the merits.

1st. The record discloses that he is under sentence of death for the alleged crime of murder; that he was arraigned for trial upon an information, was not indicted by a grand jury or presented by a grand jury. The record further discloses that a

preliminary hearing was practically denied him in the manner that the same was conducted; that is to to say, it was begun in one preliminary court, the defendant seized and taken from that court to another preliminary court which assumed to conclude what it assumed was begun in the previous preliminary court.

The record further shows that the judgment of the justice finding cause for information was made subsequent to the filing of the information itself.

We present these suggestions merely to indicate to the court what little safeguard there is against an individual being arraigned for his life upon pretense instead of evidence under the forms of law in this state.

We insist that the defendant was entitled to be presented for a felony involving his life, upon presentment by a grand jury, for the following reasons:

1st. That he was a citizen of the United States; that as such citizen of the United States he was entitled to the benefit of Article V. of the Constitution, saying:

"No person shall be held to answer for a capital * * * crime unless on the presentment or indictment of a grand jury," etc.

We admit that this provision has been construed to apply to the United States and this disposes of any pretense that we contend that it applies to the states generally.

2nd. We insist that when the state of Wash-

ington was admitted to the Union that certain restrictions and limitations were placed around her admission; and, among other things a direct agreement made between the state and the federal government that should the federal government take her into the Union, she would continue the right of citizens in so far as the same was then prescribed by the United States Constitution to the then existing territorial citizens and continue them in force in the same manner. In other words, that they should not be diminished or lessened in any degree from that which was possessed by them as citizens of the United States under the territorial government; and to this end the Enabling Act of the State of Washington prescribes:

"The Constitution (of the State of Washington) shall be republican in form * * * and not be repugnant to the Constitution of the United States."

That is to say: No part of the Constitution of the State of Washington shall be repugnant to any part of the federal Constitution upon the same question.

It is clear that it was the object to avoid in the admission of these new states, the conflict which had previously arisen under certain claims of state sovereignity and equal footing, etc.; and in Section 8, of the said Enabling Act the further words are found:

"If the Constitution * * * is republican in form and if the provisions of this act

have been complied with, the said Constitution shall be accepted," etc.

See Sections 4 and 8 of the Enabling Act admitting the State of Washington.
Acts of Congress, February 22, 1889.
Statutes at Large, 1889, page 676.

However, the constitution of the State of Washington, in violation of this direct inhibition, provided further:

"Offenses heretofore required to be prosecuted by indictment may be prosecuted by information * * * as shall be prescribed by law."

Sec. 25, Art. 1, State Constitution.

This is the warrant for the law permitting this defendant to be arraigned for his life upon an information. As before shown, the defendant was entitled to be arraigned by a grand jury under the Federal Constitution.

Section 1, Article V.

That it is apparent that the state Constitution in this regard permitting the defendant to be so arraigned for his life without a grand jury is "repugnant to the Federal Constitution" cannot be denied. It is clearly inconsistent, it is clearly contrary to the provision and guarantee of the Federal

Constitution granting immunity from such prosecutions in such manner to the citizen.

"Repugnant" as used in the Act of Congress, referring to the Constitutions of future states, has been defined as follows:

"Inconsistent; contrary to."

See "Repugnant," Anderson's Dictionary.

Texas vs. White, 7 Wallace, 728.

Now, here this repugnancy of our Constitution is apparent and is irreconcilably in conflict with the said subject of the Constitution of the United States, the Constitution of Washington in that respect, and legislation under it must fall or be treated as subordinate, by reason of the contract of our admission, agreeing that the Federal Constitution shall be superior, and by the further reason of the United States recognizing the Federal Constitution as the supreme law of the land.

Niell vs. Delaware, 103 U. S., 370.
Ham vs. Missouri, 18 How. (U. S.). 131.
Beecher vs. Weatherby, 96 U. S., 517.
New Orleans vs. U. S., 10 Peters, 731.
Glasgo vs. Parker, 128 U. S., 575.

If it be said that the Federal Constitution is but a limitation upon the federal government and not upon the state, then it is answered that the state in

this case has made *the Federal Constitution its own limitation*, and disposes by reason of the adoption of the terms of the Enabling Act of any merit to the distinction previously obtaining.

And while it may be true that as to property there may be a segregative interest, the federal government being permitted to take property in a certain way for its use, and the state to take part of the said property for its use, or both use the same property for their respective uses, here the provision of the one government may apply free from the other, because of the segregative interests of the property, *but this is without its application when referred to the life of the citizen.* When the State of Washington takes the life of the citizen because a citizen of the state, she leaves nothing of the life of the citizen of the United States, his rights under the Federal Constitution are specially preserved to him as such citizen of the federal government.

See Constitution and Enabling Act heretofore cited and authorities.
Cooley Const. Limitations, pp. 246, 247.
Paine vs. Virginia, 8 Wall., 180.
Twichell vs. Com., 7 Wall., 321.
Webster vs. Reid, 11 How., 437.
Reynolds vs. U. S., 98 U. S., 154.
Callan vs. Wilson, 127 U. S., 540.
Hennon vs. Gilmer, 131 U. S., 22.

Therefore, where the federal Constitution ap-

plies at the time of legislation of a state inconsistent therewith, or the existence of a constitutional provision in the state inconsistent therewith, then the rights of the individual under the Federal Constitution having first obtained or having first been recognized by the state as such in subsequent constitutional provisions or legislation of the state (inconsistent therewith), such state provision is invalid and inoperative and as respects matters provided in the fourteenth amendment and in the fifth amendment, article one. the said provisions are wholly void.

Owing vs. Speed, 5 Wheaton, 420.
Scott vs. Jones, 5 Howard, 343.
Niell vs. Delaware, 103 U. S., 370.
Water Power Co. vs. Green Bay and Canal Co., 142 U. S., 254.

Here the court say:

"It is argued by the defendant that the act of the legislature complained of was enacted in 1848, and the fourteenth amendment to the Constitution was not adopted until 1868, and was inapplicable * * * but it appears that the beginning of the taking of the property and the taking of the same was after the adoption of the fourteenth amendment, though assumed under the law of 1848. The company gave notice, not until 1880, that they would take this property * * * and that they claimed exclusive rights. *This may be*

considered as a deprivation within the meaning of the amendment.

Nor can it be urged that the repugnancy in the State Constitution was a known matter when the State was admitted and this was adopted as an amendment to the Enabling Act, as has been suggested by the State.

1st. No amendment could be made to that act but by congress. It was a legislative function.

2nd. The admission by the president of the State and the failing to object to this repugnacy was but a negative act of the executive, who was powerless to either amend or reject the provisions of the Enabling Act. This was decided in the Supreme Court of the United States in the Rauscher case, holding that President Pierce could not amend a treaty made with Spain and the United States Senate.

See Rauscher case. 119 U.S. 407

This is held in the Supreme Court of the United States refusing to confirm President Grant's treaty or submitted arrangement over the Cuban trouble, on the ground that it was legislation or treaty matter not within the sole power of the executive.

This is held as late as 1891 and 1892 by the Supreme Court of the United States as regards the reciprocity clause of the McKinley Act. Where they hold that if this reciprocity act vesting in the president the privilege of its enforcement was in-

tended to give him *the right to legislate by declaring whether it exists or does not exist* as a process of legislation, the law would be *utterly void;* but construing it as giving the president but the right of saying when and to whom the law should apply, it was sustained on the ground that it but permitted him to name the time and place of enforcement. The law in its entirety being made by congress.

See Marshall Field vs. Collector et al., 141, 142, 146, U. S.

Lippman et al. vs. Hedden, same case.

If it be insisted however, that the president would have the authority of Congress in this matter, then it is contended here that even Congress by its acceptance of the State Constitution by any act of congress could not have condoned the repugnancy of the two Constitutions so as to have avoided the consequences of their confliction, or have rendered the provision in the Federal Constitution subordinate to that of the State. This question is absolutely met and decided in

Barry vs. Gunn, 15 Wallace, 610-624.

Say the court:

"Section 10 of article one, of the constitution of the United States declares 'no state shall pass any law impairing the obligation of contracts.' Under the constitution of Georgia she took to herself the right of practically nullifying contracts pre-

viously made." Say the Supreme Court: "Though her constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permitted as part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. *Congress cannot by authorization or ratification give the slightest effect to a State law or Constitution in conflict with the Constitution of the United States.* * * * The legal remedies for the enforcement of a contract a State may change provided they involve no impairment of a substantial right. If the provision of the Constitution or the legislative act of the State (thereunder) fall within the category last mentioned, *they are to that extent* utterly void. They are for all the purposes * * * as if they had never existed.

Hoffman vs. Quincy, 4 Wall., 535.
White vs. Hart, 13 Wall., 646.
Gunn vs. Barry, 15 Wall., cited.

Surely then the president could not do as regards a legislative function what congress assembled could not accomplish.

The president is inhibited from doing any of the acts, the duties of which devolve on congress.

Article II, Section 2.
Kendall vs. U. S., 12 Pet., 523.
Marbury vs. Madison 1, Crach., 137.

Holding, "The president cannot control a statute, nor dispense with its execution, nor authorize the secretary to omit the performance of any act enjoined by law."

But if it be taken that the latter positions are untenable and that the president could accept the Constitution as an amendment to the Enabling Act the same as congress, then we must treat the matter as regards the repugnancy as suggesting to the presidency only such modification as on its face it seemed to bear. The clause is:

"Offenses heretofore prosecuted by indictment may be prosecuted by information * * * *as shall be provided by law.*"

We must construe this as meaning as shall be provided by law in harmony with what had been provided by law and held to be only legal provisions that the law in such case could make. That is, the president must have understood this to mean prosecutions by information in such cases as *could* be provided by law. This had previously been decided by the Supreme Court of the United States to mean offenses which were not odious; to-wit: misdemeanors punishable by fine, and this only.

In re Wilson, 114 U. S.
In re Mackin, 126 U. S.
In re Palsier, Etc., 143 U. S.

It therefore cannot be assumed that the words—as shall be provided by law—could have indicated to

the president that an attempt would be made to provide by law that which had been declared by law illegal, but only such matters as could *legally be provided by law.*

See U. S. Const. Art. 6.
Ellison vs. Hanshaw, 4 Wheaton, 225.
Chicago vs. Denver R.R., 143 U.S., 596.
Louisiana vs. Meyer, 109 U. S., 288.
Spies vs. U. S., 123 U. S., 131.

Especially must this be true where the United States constitution had expressly enacted—

That no state shall make or enforce a law which shall abridge the *privileges or immunities* of citizens of the United States.

Art. 6 U. S. Const.
Reynolds vs. U. S., 98 U. S., 154.

Therefore we take it that the law permitting informations by which one can be arraigned in a capital case is contrary to the state Constitution recognizing the Constitution of the United States as supreme, is *contrary and repugnant* to the Federal Constitution.

Article XIV., Section 5.

Is contrary to the Enabling Act:
Section 4 and Section 8.

And is therefore void and inoperative.

It is contended that because the Constitution of the State of Washington prescribes that the defendant may be presented for his life upon an information, that such gives authority so to do.

See Constitution of the State of Washington, Section 25.
Code of Washington, Vol. 2, page 814.

And that by virtue of such provision, the legislature has prescribed the method for so doing and that under this method the same has been done.

3d. We insist that the Enabling Act requiring the Constitution of the State of Washington to be consistent and "not inconsistent and not repugnant to the Federal Constitution" was to avoid this very confusion, and was a grant to the citizen of the Territory or future State that his rights were the same—were the same rights as a citizen of the United States as of the state: That is to say, as to life and liberty; for here it will be observed that the life of the citizen of the State of Washington cannot be taken without the taking the life of the citizen of the United States. We insist that the very object of the act was to protect the citizen in so far as his rights as a citizen of the United States were concerned, from having them taken or curtailed or being proceeded against in any manner than that which was his privilege as a citizen of the Territory and a citizen of the United States under the Federal Constitution. That by reason of this compact between

the Federal government and himself to admit the State into the Union upon such terms, he voted to accept the act and to pass into the union under its privileges. To now permit the State in its Constitution to make a provision, and the State after its admission to make legislation directly inconsistent and repugnant to such provision of the Federal Constitution as a citizen assumed he was protected under and were extended to him by the form of submitted admission, is to permit the State to violate the right of that citizen as guaranteed him as a citizen of the United States under the Federal Constitution, and also to violate a right guaranteed him under the laws of the United States, to-wit: The act of Congress heretofore referred to.

We insist that the rule is that:

*"If any right, privilege or immunity of the accused, secured or guaranteed by the Constitution or laws of the United States have been denied by a refusal of the State court to set aside either the indictment * * * or by any erroneous ruling in the progress of the trial, his remedy is through the revisory power of the highest court of the State and from that court by a due appeal to the Supreme Court of the United States." "Such refusal and erroneous ruling creates in the law a Federal question and establishes the jurisdiction of the court to hear the cause upon its merits."*

Gibson vs. the State of Mississipi, 16 Supreme Court Reporter, No. 27, page 907.

Sustained by the previous announcement to the same effect in:

Virginia vs. Reeves, 100 U. S., 313.
In re Wood, 140 U. S., 278.

We further insist that the rights of the defendant as claimed here by him are protected under the fourteenth amendment to the Constitution. For that, if the State through its legislation can abridge his privileges and immunities as a citizen of the United States in the protection of his life and thus deprive him of that life without that due process of law which was prescribed for his benefit and avoid its uniform application, the state would thus be permitted to violate the Constitution and deprive him of a constitutional right as such citizen.

Re Converse, 137 U. S., 624.
Caldwell vs. Texas, 137 U. S., 692.

4th. It appears by the record in this case that the Federal rights and Federal exemption here claimed were set up:

1st. By demurrer in the Superior Court; then pleaded by special plea in the Superior Court; after conviction was raised on a motion in arrest of judgment and taken to the Supreme Court of the State and in all instances, decided adversely to the defendant, and had such decision been in his favor by decisions on other points adverse, this would have

nevertheless and notwithstanding entitled him to what he claimed—a re-trial by proper process.

Thus the Federal question decided adversely to him is the direct and independent occasion of his present sentence of death.

This court has said:

"No State can deprive a particular person or class of persons of equal and impartial justice under the law * * * The power of the state must be exerted within the limits of these principles; and a judgment cannot be sustained when special, partial and arbitrary."

Caldwell vs. The State, 137 U. S., 691.

Here the Court says,—a negative assertion:

"Had the defendant claimed a right, privilege or immunity under the Constitution of the United States at the outset of the case, such being shown as having been raised in the intermediate and Supreme Courts of the State, it would be heard and passed upon by the Supreme Court of the United States."

Here we call attention to the separate opinion of Mr. Justice Dunbar of the Supreme Court of the State of Washington in this case, expressing a doubt as to whether the evidence showed the defendant guilty, and as to whether the proceeding was strictly legal. This doubt, coming from the Court, should have been sufficient to have awarded the defendant a reversal. We submit the conclusions to the consid-

eration of this Court in considering the application here made.

State vs. Nordstrom, 7 Washington Rep. 506.

We insist that as the record discloses a denial of a right to the defendant established for him by the laws of the United States—the act of Congress admitting the State to the Union and the Constitution of the United States referred to in the act—and that he claimed such all through the proceedings, vests this Court with the right to hear the cause and to ascertain what rights under the Constitution and laws he has; and then, upon the merits to say whether or not such right does not establish a privilege in him personally to claim exemption from being placed on trial for his life by a process contrary to that prescribed by the Constitution of the United States as a right, if all such rights were continued in his behalf by the act of Congress creating him a citizen of the State of Washington and of the United States conjunctively.

McKane vs. Dunston, 153 U. S., 684.

Particularly where the claim is that the State by legislation establishes a right in behalf of the State against the individual where the individual claims his right from an act of Congress or by the Constitution, such conflicting claims, if they arise out of a mere reading of the law, make a Federal question

and justifies the Court to enter into the merits, taking jurisdiction to ascertain whether the letter of the law justifies the claim of the defendant. This becomes the question on the merits after the jurisdiction is obtained, because of the apparent inconsistency or repugnancy of the different provisions of the different laws of the different sovereignties.

We think this is a fair statement of the rule laid down by this Court upon such points in

Schiveley vs. Bowlby, 152 U. S., page 1,

where the Court states:

"A State judgment reciting that a grant passed no title or right, as against a subsequent deed from the State in lands below high water mark, presents a Federal question within the appellate jurisdiction of the Supreme Court of the United States."

To the same effect:

Powell vs. Brunswick Supervisors, 150 U. S., 433.

Mobile & O. Railroad Co., vs. Tennessee, 153 U. S., 486.

The real test of the question as has been established by this honorable court is as follows:

"Where it appears that some title, right, privilege or immunity on which a claim depends will be defeated by one construction of the Constitution *or of a law of the United States*, or sustained by an opposite construction, the cause is one arising under the Constitution or laws of the United States."

Cook vs. Avery, 147 U. S., 375.

Following the dicta in

McPherson vs. Blacker, 146 U. S., 1.
Boyd vs. Nebraska, 143 U. S., 135.

These views were practically announced by this Court in

O'Neil vs. Vermont, 144 U. S., 323.

The Court holding, however, that the facts in that case did not bring it within the rule of the law.

We respectfully submit that a Federal question is fully raised and fully sustained under the rulings of this Court as shown by the record in the cause at bar; and ask that the jurisdiction be sustained and the motion to dismiss be denied.

Most respectfully submitted,

JAMES HAMILTON LEWIS,
Attorney for Appellant.

J. A. STRATTON,
L. C. GILMAN, *of Counsel.*

Office Supreme Court U. S.
FILED.
JAN 24 1896
JAMES H. McKENNEY,
CLERK.

164-705

IN THE

United States Supreme Court

FOR THE DECEMBER TERM, 1895.

CHARLES W. NODSTROM, Appellant,
vs.
STATE OF WASHINGTON, Respondent,
} No. ~~635~~ 284

JAS. HAMILTON LEWIS,
Attorney for Respondent.

IN THE

United States Supreme Court

FOR THE DECEMBER TERM, 1895.

CHARLES W. NODSTROM, Appellant,
vs.
STATE OF WASHINGTON, Respondent. } No. ——.

OPPOSITION TO RESPONDENT'S MOTION TO ADVANCE.

Appellant, through his counsel, begs to submit his opposition and objection to advancement of this cause, and begs that the cause may take its usual course, for that

I.

The case is one where appellant is under death sentence, urging before this court propositions for relief which are applicable solely to his cause alone, and neither can nor do affect any other cause before this court or now before any

other court. Thus the questions are but of personal application, and not of the general importance contended for by the State.

II.

CAUSE NOT READY.

Appellant begs to inform the court that his cause was taken up by the Sweedish Consul after this appellant had been convicted upon circumstantial evidence and the judgment approved, and the present counsel engaged. That the appellant is without means save those obtained from the aid of Sweedish citizens through the appeal of the Sweedish representative residing in the United States. That it is quite impossible to defray the expenses of such printing of the full record and briefs until such appeal has been fully answered, and to press same now would be to embarrass the conditions of appellant's cause (further suggestions of which in further detail become unnecessary before this honorable court), while the usual time which would elapse before the hearing in ordinary course of affairs would greatly expedite and aid appellant's opportunity for full presentation and proper hearing of his cause. That the expenses heretofore incurred have absorbed such funds as have been at the command of appellant.

III.

THAT THE HEARING MAY BE UNNECESSARY.

Appellant begs to inform the Court that the questions raised here by this appellant upon which he seeks review of his said cause, are now invalid in a contest over certain school lands in the State of Washington, the legislation concerning which is similar to that questioned here—

That the Supreme Court of the State has decided said cause, but that a petition for rehearing has been made and is, as appellant is informed, that he may inform this Court —has not yet been disposed of—*The rehearing depending on the now newly raised propositions* contained in the petition of this appellant for his appeal to this Court.

That should such rehearing be granted this appellant can likewise obtain a reconsideration of his cause by appropriate proceedings and obtain his relief at once without the extreme cost and expense of what would now be an unnecessary course should such rehearing be had.

For which reasons

Appellant urges that it is not expedient to advance said cause nor to the advantage of justice so far as this appellants rights are concerned.

Wherefore appellant urges that said action to advance be denied.

Most respectfully submitted.

JAMES HAMILTON LEWIS,
Appellant's Attorney.

THE CAPITAL PRESS

64-705

FILED.
OCT 7 1896
JAMES H. McKENNEY

164-705

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1896 1895.

CHARLES W. NORDSTROM
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON
Defendant in Error.

No. 635 284

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS FOR WANT OF JURISDICTION.

ADDISON W. HASTIE,
Attorney for Defendant in Error.

JOSEPH SHILLINGTON,
Of Counsel.

NEWMAN & MOULTON, PRINTERS, HINCKLEY BLOCK, SEATTLE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. ~~1895~~ 1896.

CHARLES W. NORDSTROM
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON
Defendant in Error.

No. ~~635~~ 284

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Now comes the State of Washington defendant in error, by its attorneys, and moves the court to dismiss and set aside the writ of error herein, and all proceedings taken by the plaintiff in error thereunder.

In support of this motion the defendant in error respectfully represents to the court.

STATEMENT OF THE CASE.

The plaintiff in error, Charles W. Nordstrom, having been arrested charged with murder, and after a

preliminary examination before a committing magistrate was committed to appear before the Superior Court. Thereafter, on December 8th, 1891, the Prosecuting Attorney filed in the Superior Court an information against the accused charging him with murder in the first degree. He was tried by a jury and convicted of the offense as charged, and was thereupon sentenced to be executed. From the judgment an appeal was taken to the Supreme Court of the State, and was by that Court in all things affirmed. State vs. Nordstrom, 7 Wash., 506. Thereafter, upon application of the accused, the Chief Justice of the Supreme Court of the State of Washington granted a writ of error, citation and order staying all proceedings. The case was then sent to the Supreme Court of the United States, and after nine months' delay it was docketed and the record thereof filed. In January, 1896, on motion of the defendant in error (counsel for the accused opposing), the cause was advanced, and the hearing set for next October. At the time of making the motion to advance, the present counsel for defendant in error was under the impression that during the past five years a motion had been made to dismiss for want of jurisdiction, but through different administrations of officers and long distance from this court it has been almost impossible to keep the case close in hand.

ARGUMENT.

This motion to dismiss ought to be granted for the following reasons:

I.

The case presents no Federal question for the consideration of the court.

II.

For other good and sufficient reasons appearing on the face of the record.

It is urged by counsel for plaintiff in error that by reason of the fact that the accused was not indicted by a grand jury, but tried upon an information, his constitutional rights were invaded, and this court should take jurisdiction of the case. It is admitted that the accused was not tried upon an indictment found by a grand jury. He was proceeded against: First — By verified complaint before a committing magistrate. Second—Upon the accused being held to answer the Prosecuting Attorney filed an information in proper form and duly verified, upon which the accused was tried in the same manner as upon indictment. The authority for this procedure is found in Article 1, Section 25 of the Constitution of the State of Washington (page 814 2nd Vol. Hill's Code of Washington, and pages 1202-4 Sections 1203 and 1204 same volume, (Session Laws of 1891).

The Constitution and laws of Washington providing for prosecutions by informations instead of indictments are similar to those of California, where this procedure has prevailed for nearly twenty years. In 1883 the constitutionality of this law was questioned, not only in the Supreme Court of California, but on writ of error in the Supreme Court of the United States, in the case of Hurtado vs. People of California. In that case the defendant was charged with the crime of murder before a committing magistrate, and after a preliminary hearing was held to answer to the Superior Court. Thereafter an information was filed against him by the prosecuting officer, charging the accused with murder in the first degree. He was tried and convicted as charged. On appeal the case was confirmed by the Supreme Court of that State. Upon the case being brought to the Supreme Court of the United States it was again affirmed. The carefully prepared opinion therein rendered by Mr. Justice Mathews reviews all the constitutional objections raised in the case at bar. They are all answered in that case and overruled.

Hurtado vs. California, 110 U. S., 516.

It has become a rule that when a Federal question has been once decided in this court it ceases to be a Federal question. In other words, when this court has decided a matter it becomes final—No question thereafter remains.

Removal of Causes (Dillon), p. 95, sec. 79 (5th Ed.).

As this court has passed upon the validity of the constitution and laws of California in regard to prosecutions under informations for murder, and the law is similar to that of Washington, we trust it will not deem it incumbent to devote its time to long hearings on the same proposition. If a litigant from the State of Washington is entitled to his writ of error, then a litigant from every state in the Union can demand the same time on the same question. In fact, if a decision only reaches one litigant then there is no limit to the number of hearings on the same proposition. Such proceedings ought not to prevail. Mr. Justice Brewer laid down the rule in Kansas vs. Bradley as follows : When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a Federal question.

> *Kansas vs. Bradley, 26 Federal, 289;* see also
> *Blue Bird Min. Co. vs. Largey et al., 49 Fed., 289.*
> *Dill. Rem. Causes (5th Ed.), sec. 79.*

It was urged by counsel for the accused before the Supreme Court of the State, in this case, that the Enabling Act of Congress (February 22nd, 1889,) under which the states of North and South Dakota, Montana and Washington were admitted into the Union, limited their constitutional power. His contention was that Congress had restricted these new states in their right of self-government, and that they were not on an

equality with their sister states. This contention is based on that portion of the Enabling Act which provides that "The constitution (for the new states) shall . . . . . not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence". This language in the Enabling Act was only intended that the Constitution of the United States should be recognized by the new states. If this law of Congress had attempted to release the new states from constitutional authority, or if it had been silent on the subject, the effect no doubt would have been the same. If it is claimed that Congress has attempted to pass restrictions on these new states, and that they have not been admitted into the Union on an equality with the others, then it has exceeded its power. If Congress can control or make a constitution for a state in part, it might, in form of amendment, make it entire. Congress has no power to impose on any new state, on its admission into the Union, any restrictions or limitations not imposed upon all.

Pollard vs. Hagan, 3 Howard, 312.
Permoli vs. New Orleans, 3 Howard, 589.
Strader vs. Graham, 10 Howard, 82.
Vinie vs. Moore, 14 Howard, 568.
Scott vs. Sanford, 19 Howard, 395.

It has also been the contention of counsel for the accused that as the Constitution of the State of Washington recognizes the Constitution of the United States

in this language: "The Constitution of the United States is the supreme law of the land," therefore it becomes the constitution of the state. This declaration only proclaims what has been a self-evident fact for a century that the constitution of the United States is the supreme law of the *land*, meaning by the term "land" the United States of America. It is evident that the framers of the Constitution of Washington did not intend to yield any of the rights belonging to the states and the individuals. It is declared in Art. 1, Sec. 1, (the section preceding the one quoted) of the Constitution of Washington, page 809, 2nd vol. Hill's Code of Washington, that "All political power is inherent in the people, and governments derive their just powers from consent of the governed". It also repeats many of the provisions contained in the Constitution of the United States, changes some, and omits others. It is, therefore, apparent that it does not adopt it as the Constitution of the State, but recognizes it the same as the other states do—namely, it is the "supreme law of the land". The specific and radical change in the mode of criminal procedure, from indictment to information, for Washington, shows that the people framing the State Constitution did not intend to rely on general terms and expressions, such as "Supreme law of the *land*" and "Declaration of Independence" for the constitution of their state. These patriotic utterances were no doubt intended as expressions of loyalty by the people of the new state to the general government.

The remaining point mentioned in the petition for the writ of error was that the account book, and the boots of accused were taken from him, when searched at the time of his arrest, and afterwards put in evidence, and that, on cross-examination, his feet were measured and thereby his constitutional rights were again invaded. It is a well established rule that personal effects ef every kind can be taken from the person of the accused and used in evidence if they tend to prove or disprove an issue in the case.

State vs. Graham, 74 N. C., 646.
State vs. Nordstrom, 7 Wash., 510.

If these last objections, in any of their phases, once contained a Federal question, it has been removed by the accused making himself a witness in his own behalf. Certain rubber boots were produced in evidence on the part of the state, which corresponded in size and peculiarities to the tracks discovered immediately after and near the scene of the murder. The accused, when on the witness stand in his own behalf, at the request of his counsel, made apparently extraordinary efforts to place his feet in the boots, but failed to put them on. In rebuttal a shoemaker was called who measured the boots and the feet of accused, and testified that the boots were sufficiently large to be worn on a foot of that size. The statement of this evidence is sufficient in itself to demonstrate to the court that no error has been committed and no Federal question is involved.

The Chief Justices of the Supreme Court of Washington have apparently considered, and treated a writ of error as a writ of right, judging from the number sued out during the last three years. This illy considered and unfortunate view has not been, however, entertained by the Supreme Court of the United States.

State vs. Hurtado, 110 U. S., 516.

The law must be enforced without unusual delay, if it is to have its proper force and effect in the far western country. It is to be hoped that hereafter, when a murder is committed, six years of time will not be consumed in bringing the perpetrator thereof to justice.

Wherefore the defendant in error moves this honorable court to dismiss the writ of error herein, and set aside all proceedings taken by plaintiff in error thereunder.

ADDISON W. HASTIE,

Attorney for Defendant in Error.

JOSEPH SHILLINGTON,

Of Counsel.

To JAMES HAMILTON LEWIS, ESQ.,

Attorney for Plaintiff in Error:

Please take notice that the foregoing and attached motion to dismiss will be brought on for hearing before the Supreme Court of the United States, in the city of Washington, D. C., on Monday, October 19th A. D. 1896, at twelve o'clock noon of that day, or as soon thereafter as counsel can be heard.

ADDISON W. HASTIE,

Attorney for Defendant in Error.

JOSEPH SHILLINGTON,

Of Counsel.

164-765

Office Supreme Court U.S.
FILED
DEC 2 1895
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES W. NORDSTROM, *Plaintiff in Error,*

vs.

THE STATE OF WASHINGTON, *Defendant in Error.*

No. 284

MOTION TO ADVANCE.

W. C. JONES,
Attorney General of the State of Washington.

O. C. WHITE, - - STATE PRINTER.

Filed this ..... *day of* ....., *189*....

..... *Clerk.*

IN THE SUPREME COURT

OF THE

UNITED STATES.

CHARLES W. NORDSTROM, *Plaintiff in Error,*

vs.

THE STATE OF WASHINGTON, *Defendant in Error.*

No. .....

MOTION TO ADVANCE.

W. C. JONES,
Attorney General of the State of Washington.

OLYMPIA, WASH.:
O. C. WHITE, . . STATE PRINTER.
1895.

IN THE SUPREME COURT OF THE UNITED STATES.

CHARLES W. NORDSTROM,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON,
Defendant in Error.

MOTION TO ADVANCE.

Comes now the defendant in error in the above entitled cause, by W. C. Jones, Attorney General of said State of Washington, and moves this honorable court to advance the hearing of the above entitled cause to an early date.

In support of this motion the defendant in error respectfully represents to the court:

I.

That on the 8th day of December, 1891, an information was duly filed by the prosecuting attorney of King county, charging the plaintiff in error with the crime of murder in the first degree, and thereafter such proceedings were had upon said information as that the said plaintiff in error was duly tried and convicted of the crime charged in the information, and sentence was passed upon him by the superior court of said King county on the 2d day of April, A. D. 1892, commanding the sheriff of King county to execute upon him the sentence of death. Thereafter he

duly prosecuted an appeal to the supreme court of the State of Washington, and upon the hearing of said appeal the judgment of the superior court of King county was affirmed, a motion for rehearing overruled, and by the order of the supreme court of the State of Washington, dated March 26, 1894, the judge of the court below was directed to cause the sentence to be carried out, in pursuance of which order said plaintiff in error was brought before the honorable superior court of King county on the 23d day of June, A. D. 1894, and he was again sentenced to be hanged.

From the decision of the supreme court of the State of Washington overruling his several exceptions and objections and affirming the judgment of the superior court of King county, plaintiff in error prosecutes this writ. He contends that the trial and judgment were irregular and illegal for the following reasons:

First. That he could not be legally tried excepting upon the indictment of a grand jury, and that his trial upon an information filed by the prosecuting attorney was in violation of the fifth amendment to the constitution of the United States and the act of congress of February 22, 1889, admitting the State of Washington into the union, because the fifth amendment to the federal constitution provides that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, etc., and that the act of February 22, 1889, admitting the state into the union, pro-

vides that the constitution of the state should not be repugnant to the constitution of the United States.

Second. That his account book was taken from him by the sheriff of King county and used upon the trial for the purpose of furnishing evidence of his whereabouts at and about the time of the commission of the offense.

Third. That he was required by the court to expose his person to the jury by removing his boots from his feet, and was also required by the court to attempt to draw upon his feet a certain pair of boots which were in evidence; in which particulars he insists that the fifth amendment to the federal constitution was violated by requiring him to be a witness against himself.

Fourth. That the information did not inform him of the nature and cause of the accusation, as required by the sixth amendment to the federal constitution, and that it was therefore illegal to try him upon such information.

II.

The defendant in error further urges in support of this motion that several writs of error have been prosecuted to this honorable court from the supreme court of the State of Washington in other criminal cases, in which some of the same grounds of illegality are urged as are urged in this case; and that the execution of the laws of the State of Washington in these cases is suspended by these several writs of error; and that it is highly important and desirable that the objections now raised by the plaintiff in

error in this case, particularly the objection that a capital or otherwise infamous crime cannot be tried in this state excepting upon presentment or indictment of a grand jury, should be decided without delay.

Wherefore, the defendant in error prays that this case may be set down for hearing at the earliest date consistent with the convenience of this honorable court.

Respectfully submitted.

W. C. JONES,

Attorney General, State of Washington.